Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LOREN LOVING VAIL,
Petitioner,

vs.

THE PLAIN DEALER PUBLISHING COMPANY
AND JOSEPH DIRCK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Ohio may lawfully disregard this Court's holding in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) and adopt a broad opinion privilege in libel cases purportedly based on a separate state constitutional provision that is more restrictive as to speech than the First Amendment?

2. Whether the First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution require that a state provide a reasonable means to vindicate reputational interests adversely affected by the publication of defamatory falsehoods that are actionable under the standard that this Court adopted in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) and reaffirmed in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)?

3. Whether the Supreme Court of Ohio's "test" for determining whether a particular statement is actionable in a libel case violates Petitioner's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner is Loren Loving Vail, an attorney at law and a former candidate for the Ohio Senate. She is a resident of Cuyahoga County, Ohio.

Respondents are the Plain Dealer Publishing Company, the publisher of The Plain Dealer, a newspaper of general circulation in Northeastern, Ohio and elsewhere (it bills itself as "Ohio's largest newspaper") and Joseph Dirck, a "columnist" employed by the Plain Dealer Publishing Company.

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Opinions Below

The decision of the Supreme Court of Ohio reversing the judgment of the Ohio Court of Appeals for the Eighth Appellate District (Cuyahoga County, Ohio) is reported in 72 Ohio St. 3d 279 (1995) and is set forth in the Appendix at A-2 to A-10. The judgment of the Ohio Court of

Appeals for the Eighth Appellate District is unreported and is set forth in the Appendix at A-11 to A-26. The order of the Court of Common Pleas of Cuyahoga County, Ohio in Case No. 214325 granting Respondents' Motion to Dismiss is unreported and is found in the Appendix at A-27.

Jurisdiction

1. On May 31, 1995, the Supreme Court of Ohio reversed a judgment of the Ohio Court of Appeals for the Eighth Appellate District (Cuyahoga County, Ohio). That action constitutes the final order of the Supreme Court of Ohio with respect to this case.

2. Jurisdiction to hear this writ of certiorari is conferred on this Court by 28 U.S.C. § 1257(a)(1988).

Constitutional and Statutory Provisions

The First Amendment to the United States Constitution provides, in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Fourteenth Amendment to the United States Constitution provides, in part:

> No state shall . . . deprive any person of life, liberty or property, without due process of law.

Title 28 U.S.C. § 1257 (1988) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statues of, or any commission held or authority exercised under, the United States.

Statement of the Case

The Facts

Loren Loving Vail is an attorney at law who lives and practices in Northeastern, Ohio (Complaint at ¶ 1). In 1990, she was the Republican candidate for the Ohio Senate from the 25th District.[1] (Complaint at ¶ 2).

During the course of her campaign, an issue arose regarding a Catholic high school's decision to add the words "born and unborn" to the Pledge of Allegiance as it was recited at the school. (Complaint at ¶ 2). A local gay newspaper criticized the school for that decision. (Complaint at ¶ 2). Vail issued a press release in response to the criticism supporting the school's

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[1]. Mrs. Vail's opponent in the election was Eric Fingerhut who went on to be elected to Congress from the Nineteenth Congressional District in Ohio. Mr. Fingerhut was beaten in 1994 by the Hon. Steven Latourette.

decision.

In response to Petitioner's press release, Joseph Dirck, a columnist for The Plain Dealer, a metropolitan newspaper in Northeastern Ohio, wrote a vicious and defamatory article which appeared in the October 19, 1990 editions of the paper. The article, entitled **"Gay-basher takes refuge in the closet,"** is reproduced in the Appendix as A-28 and, for the convenience of the Court, is quoted in its entirety below:

Gay-basher takes refuge in the closet

> As this appears to be a cornerstone of her campaign, we'll put it real high so nobody misses it: Loren Loving Vail doesn't like gay people. Everybody got that? Good.
>
> Despite earlier disavowals that she would do so, Vail, a Republican running for the 25th District seat in the Ohio Senate, has added gay bashing to the repertoire of right wing, neo-numbskull tactics she is employing in her increasingly distasteful campaign against Democrat Eric

Fingerhut.

Her latest eruption came this week, when she got on her high horse about Lorain Catholic High School adding the words "born and unborn" to the end of the Pledge of Allegiance. Although Lorain is a long way from the East Side 25th District. Vail issued a news releases defending the school's First Amendment rights and blasting "the minority far left individuals who attack those who want to return value consciousness and stability to their society."

Now, I'm all for the First Amendment, but I think Vail is a little confused. No one on the left, to my knowledge, was challenging the school's right to free speech. Representatives of both the American Civil Liberties Union and the National Organization for Women, in fact, defended that very right. Those who would outlaw the things with which they disagree more often than not come from Vail's end of the political spectrum.

This might have been just another example of an opportunistic candidate trying to get a little mileage out of a momentarily hot issue, but Vail also took the occasion to make another pitch for the homophobic vote, attacking the

Gay People's Chronicle for a recent editorial criticizing Lorain Catholic and for a cartoon poking fun at Vail's "pro-values" campaign.

Calling the cartoon "obscene" (the neo-numbskulls toss that word around a lot, but this particular cartoon doesn't even come close). Vail couldn't resist noting in closing that her opponent, "Mr. Fingerhut, and his far left agenda, is supported by (the Chronicle)."

Deja vu. Last June, Vail similarly interjected herself into the controversy over the speech governor's wife Dagmar Celeste gave to a gay group in Cincinnati. Although many, including myself, questioned the propriety of the language Celeste used in a public setting, Vail escalated it into an anti-homosexual diatribe, and again tried to nail Fingerhut on a guilt-by-association rap.

"Dear Media," she coyly added to the end of her June news release, "I have only heard, not read, that my opponent, Mr. Fingerhut, has been endorsed by the Gay People's Chronicle. Could you please check this out for me? Thank you."

Well, maybe her strategy will work. Vail wouldn't be the first candidate to latch onto

homophobia as a ticket to Columbus. She need look no farther than Parma, where Sen. Gary Suhadolnik has developed it into an art form. He's such an outspoken and vitriolic gay-hater you wonder what a psychiatrist would have to say about it.

The only thing I don't understand is why, when she was asked about the Dagmar incident during an interview at The Plain Dealer, Vail went to such lengths to deny any intention to use gay-bashing as a campaign tactic. Why, goodness no, she insisted, that was the farthest thing from her mind.

Of course, she could understand how someone reading her comments might have gotten that impression, but she's not the sort of person to take political advantage of prejudice and mindless hatred directed at a particular group of people. She certainly would be more careful in the future, she promised the folks here.

So much for promises. Having learned long ago never to underestimate the neo-numbskull vote, I won't hazard a guess on whether her hate-mongering will work.

But although I personally don't have much use for bigots of any sort, I have a particular

problem with those who can't even be up front about it.

Honesty, it would appear, is one value on which Vail is not so "pro."

Petitioner's complaint asserted that the following statements from the foregoing article were both false and defamatory:

- That she "doesn't like gay people."
- That her alleged "disdain" of gay people was the "cornerstone of her campaign" for the Ohio Senate.
- That she "added gay-bashing to the repertoire of right wing, neo-numbskull tactics she is employing in her increasingly distasteful campaign . . . "
- That she has engaged in an "anti-homosexual diatribe."
- That she is "dishonest" about "being up front" about being a "bigot."
- That she has "latched onto homophobia as a ticket to Columbus."

The Proceedings

On July 11, 1991, Petitioner filed her complaint in the Court of Common Pleas of Cuyahoga County, Ohio against Joseph Dirck and the Plain Dealer Publishing Company (Case No. 214235). Instead of answering, the Respondents filed a Motion to Dismiss under Ohio R. Civ. Proc. 12(B)(6) asserting that the story contained only non-actionable "bombast, sarcasm, and name calling".

Petitioner filed an extensive brief in opposition to the Motion to Dismiss pointing out that under Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) she could recover if she could prove that the assertions alleged to be defamatory were false and if they could be reasonably interpreted as stating actual facts about her.

Petitioner also noted that the motion had been filed without any

discovery having preceded it. Further, she made clear that Ohio law applicable to such motions required the court to accept as true the allegations in the complaint.

Nevertheless, on January 13, 1992, Respondents' Motion to Dismiss was granted in its entirety without opinion.

Petitioner filed a timely appeal to the Ohio Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio (Case No. 63223). On July 22, 1993, the Court of Appeals reversed the judgment in part, affirmed it in part, and remanded the case for further proceedings. It found "actionable, under the constraints of a motion to dismiss, the statements that Vail dislikes homosexuals, engaged in an 'anti-homosexual diatribe' and fostered homophobia in an attempt to be elected". The Court expressly determined that these statements were capable of

being proven false and could reasonably be interpreted as stating actual facts about the Petitioner.[2]

Respondents appealed to the Supreme Court of Ohio on August 31, 1993. On May 31, 1995, the Supreme Court of Ohio reversed the decision of the Court of Appeals, finding that all of the statements were "opinion" under the formulation announced in Scott v. News-Herald, 25 Ohio St. 3d 243 (1986).

Petitioner respectfully asks this Court for a writ of certiorari to definitively decide the foregoing questions of great constitutional importance.

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[2]. Petitioner did not file a cross appeal with respect to those portions of the article about which the Court of Appeals sustained the trial court's judgment of dismissal.

REASONS FOR GRANTING PETITIONER'S WRIT

Before this Court's seminal decision in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), the highest courts of 38 states and all of the United States courts of appeal had recognized an "opinion" privilege in libel cases. The source of the privilege was the First Amendment.

Unfortunately, as Chief Justice Rehnquist has observed, the distinction between opinion and fact was often resolved with a "meat axe" without regard for the "subtle and difficult questions" presented and the "rich and complex history of the struggle of the common law to deal with this problem". Ollman v. Evans, 471 U.S. 1127, 1129 (1985) (Rehnquist, C.J., dissenting from the denial of petition for writ of certiorari).

In Milkovich v. Lorain Journal Co., *supra*, this Court rejected the opinion privilege altogether in libel cases after carefully weighing the competing interests at stake. The Court recognized that libel defendants, particularly in public figure or public official cases, already had very broad protection by virtue of a line of cases starting with New York Times Co. v. Sullivan, 376 U.S. 254 (1964).[3]

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[3]. Particularly noted were Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (extending the "actual malice" standard to "public figures"); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (expanding definition of "public figure"); Philadelphia Newspapers, Inc., v. Hepps, 475 U.S. 767 (1986) (disavowing the common law presumption that defamatory speech is false when a plaintiff seeks damaged against a media defendant for speech of public concern); Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6 (1970) (limiting defamation actions to certain types of speech and requiring that the speech state actual facts about the plaintiff, *see*, also, Letter Carriers v. Austin, 418 U.S. 268, 284-286 (1974)); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) (appellate court must independently examine record as a whole to ensure that a judgment in favor of a plaintiff in a defamation case does not "constitute forbidden intrusion on the field of free expression"); and Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S.

This Court reasoned that the "vital guarantee of free and uninhibited discussion of public issues" had to be balanced with

> the other side of the equation; we have regularly acknowledged the 'important social values which underlie the law of defamation, and recognized that' [s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation. Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) * * * The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.
>
> * * * * *
>
> The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

657, 685 (1989) (whether the evidence to support actual malice in a public figure defamation case is one of law).

Rosenblatt v. Baer, *supra*, at 92-93 (Stewart, J., concurring). Although it rejected a separate opinion privilege, this Court nevertheless confirmed that a libel plaintiff still must be able to prove that the statements complained about were false and that they reasonably could be construed as stating actual facts about the person. 497 U.S. 1, at 19.

By rejecting the notion that the First Amendment required a separate opinion privilege, the Court "held the balance true" between the need for free and inhibited discussion of public issues and the need to vindicate reputational damage caused by publication of defamatory falsehoods. 497 U.S. 1 at 21.

In the case at bar, the Supreme Court of Ohio, acting under the guise of Section 11, Article I of the Ohio Constitution, flatly repudiated the

reasoned and balanced decision in Milkovich. In its place, it once again[4] adopted a standardless, malleable four-part "totality of the circumstances" test. Vail v. Plain Dealer Pub. Co., 72 Ohio St. 3d 279 (1995)(Syl 1). Unless this Court reviews that decision, the "only hope" for Petitioner and countless others like her "whose reputation[s] [have] been falsely dishonored" will have been snuffed out in Ohio due to its adoption of a standardless wholesale opinion privilege. Rosenblatt v. Baer, *supra* at 92-93 (Cf. this Court's statement in Milkovich that the First Amendment did not provide a "wholesale defamation exception for anything that might be labeled 'opinion'". 497 U.S. at

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[4]. The Supreme Court of Ohio first adopted this "test" in Scott v. News-Herald, 25 Ohio St. 3d 243 (1986). Scott was *sub silentio* overruled by this Court in Milkovich (i.e. the decision from which the Milkovich case was appealed to this Court relied entirely on Scott. Milkovich, *supra* at 10.

18). Petitioner calls on this Court to "hold the balance true" in the face of this attack.

A. **THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT DESPITE THE FACT THAT PURPORTEDLY IT WAS BASED ON SECTION 11, ARTICLE I OF THE OHIO CONSTITUTION RATHER THAN ON THE FIRST AMENDMENT.**

This Court is not precluded from reviewing the decision below merely because the lower court attempted to insulate itself from review by making it appear to rest on separate, adequate and independent state-law grounds. As a consequence of its rejection of a constitutional opinion privilege, this Court in Milkovich reversed a decision of an Ohio Court of Appeals[5] that had granted a summary judgment based on a

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5. The Ohio Court of Appeals for the Eleventh Appellate District, Lake County, Ohio granted a summary judgment in Milkovich. The Supreme Court of Ohio declined to accept jurisdiction for want of a substantial constitutional question. This Court granted certiorari and reversed.

broad opinion privilege. The summary judgment was based entirely on the Supreme Court of Ohio's 1986 decision in Scott v. News Herald, 25 Ohio St. 3d 243 (1986) recognizing a broad opinion privilege based in part on the Section 11, Article I of the Ohio Constitution.[6] 497 U.S. at 12, fn 5.

The respondents in Milkovich argued that Scott precluded review by this Court because it rested on separate, adequate and independent state grounds, *viz.* Article I, Section 11 of the Ohio Constitution. 497 U.S. 12 at fn. 5.

This Court "reject[ed] this contention" because, consistent with its decision in Michigan v. Long, 463 U.S. 1032 (1983), the Scott case relied "heavily on federal decisions

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[6]. That section reads in pertinent part as follows: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right . . . "

interpreting the scope of First Amendment protection accorded defamation defendants." 497 U.S. at 12, fn 5. In addition, Scott was "at least interwoven with the federal law". Moreover, Scott did not make not it "clear on its face as to the court's intent to rely on independent state grounds." Ibid.[7]

Transparently mindful of the Milkovich decision, the Supreme Court of Ohio crafted its opinion in the case at bar so as to make clear that Scott was premised on the Ohio Constitution rather than on the federal Constitution. It is obvious that this distinction was made solely to insulate the decision from review by this Court in light of the fact that Scott was rejected and repudiated by this Court in Milkovich. As will be seen

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[7]. This Court kept the issue open however by noting at the end of footnote 5 that "the Supreme Court of Ohio remains free . . . to address all of the foregoing issues on remand". 497 U.S. at 12, fn. 5.

below, the lower court's reliance on the Ohio Constitution is but a shibboleth.

The essence of the Supreme Court of Ohio's opinion in Vail is that the four-part test in Scott (recognizing a broad opinion privilege based on a constellation of four nebulous factors) is the law in Ohio notwithstanding this Court's decision in Milkovich. The claimed doctrinal basis for this position is Section 11, Article I of the Ohio Constitution rather than the First Amendment:

> Notwithstanding *dicta* [in Scott] stating that the article was protected opinion under the First Amendment to the United States Constitution, our holding [in Scott] was premised on Section 11, Article I of the Ohio Constitution.
>
> * * * * *
>
> . . . The United States Supreme Court reached a different conclusion from an application of the First Amendment to the United States Constitution than we had reached in Scott applying the Ohio Constitution . . . Regardless of the outcome in

> Milkovich, the law in this state is that embodied in Scott. The Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press (emphasis supplied).

Vail, *supra* at 281.

The threshold question in this case, therefore, is whether under Michigan v. Long, *supra*, the decision is reviewable by this Court.

Petitioner respectfully suggests that this decision is reviewable under Michigan v. Long in light of other decisions from the Supreme Court of Ohio interpreting the very section of the Ohio Constitution on which it claims to have relied. The Supreme Court of Ohio has repeatedly and again only very recently made clear that Section 11, Article I of the Ohio Constitution affords no broader free speech guarantees than does the First Amendment and, most importantly, that "the First Amendment is *the* proper

basis for interpretation of Section 11, Article I of the Ohio Constitution". Eastwood Mall, Inc. v. Slanco, 68 Ohio St. 3d 221, 222 (1994); *citing* State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals, 63 Ohio St. 3d 354, 362-363 (1992), Zacchini v. Scripps-Howard Broadcasting Co., 54 Ohio St. 2d 286, 288 (1978) and State v. Kassay, 126 Ohio St. 177, 187 (1932) (emphasis supplied). In Eastwood Mall, *supra*, decided on February 9, 1994, the Supreme Court of Ohio declared that this Court's First Amendment analysis was the (i.e. the exclusive) proper basis for interpreting the section of the Ohio Constitution (on which it relied in Vail):

> [F]ree speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment, and . . . the First Amendment is the proper basis for interpretation of Section 11, Article I of the Ohio Constitution (emphasis supplied).

Id. at 222.

In light of Eastwood Mall, *supra*, and its predecessors, it is disingenuous and flatly oxymoronic to say that Section 11, Article I of the Ohio Constitution provides a separate, adequate, and independent rule of law for the Vail decision but that the First Amendment (which this Court has held in Milkovich does not require an opinion privilege) is the "proper basis for interpreting" that same section.

Moreover, this Court has already held that Scott does not preclude federal review. 497 U.S. 1 at 12, fn 5 (1990). Moreover, Vail merely reaffirms the result in Scott. Vail, *supra* at 281.

Since this Court has determined in Milkovich that the First Amendment does not require an opinion privilege, it is impossible to reconcile Vail with Milkovich particularly in light of the

Supreme Court of Ohio's pronouncements on the effect and meaning of Section 11, Article I of the Ohio Constitution.

In Michigan v. Long, the "vexing" issue of whether there is federal jurisdiction to review a state court's judgment that may be based on "adequate and independent" state grounds was addressed. First and foremost, this Court has the responsibility to "'ascertain for itself . . . whether the asserted non-federal ground independently and adequately supported the judgment'". Id. at 1038, *quoting* Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931). The mere fact that a state court says that it is relying on independent and adequate state grounds does not end the inquiry. Id. at 1038.

Where there are *bona fide* separate, adequate, and independent state-law grounds for a decision, the

jurisprudential limitation on advisory opinions comes into play. Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 636 (1874), Berea College v. Kentucky, 211 U.S. 45, 53 (1908); *See* 13 Wright, Miller & Cooper, Federal Practice & Procedure § 3529.01. If a state court judgment rests on separate, adequate and independent state grounds, correction of a state court's view of federal law would not obviate the fact that a separate state-law basis for decision nevertheless exists. Herb v. Pitcairn, 324 U.S. 117, 125 (1945); L. Tribe, American Constitutional Law § 12-12 (1988).

Michigan v. Long establishes an outline for determining whether a decision in fact rests on separate, adequate and independent state-law grounds:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven

> with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on *bona fide* separate, adequate, and independent grounds, we, of course, will not undertake to review the decision (emphasis supplied).

463 U.S. 1032, 1040-1041 (1983).

In the case at bar, the Supreme Court of Ohio attempted to base its decision on Article I, Section 11 of the Ohio Constitution rather than on the First Amendment. However, as noted above, this is not a separate,

independent, and adequate state-law ground in light of the body of cases holding that this section of the Ohio Constitution must be interpreted consistently with the First Amendment and that this Court's interpretation of the First Amendment controls the scope of the Ohio constitutional protections provided under this section.

Accordingly, this Court is not barred from reviewing the decision in line with Michigan v. Long. The decision is clearly "interwoven with federal law" by virtue of the Supreme Court of Ohio's own precedents and by virtue of the Scott case which this Court has already found rests in a substantial way on federal law. 497 U.S. at 12, fn. 5.

B. **THE LAW OF LIBEL IN THE UNITED STATES IS IN MAJOR RESPECTS GOVERNED BY FEDERAL COMMON LAW ARISING OUT OF THE FIRST AMENDMENT. IN ORDER TO PROTECT AGAINST THE COMPLETE EVISCERATION OF REPUTATIONAL INTERESTS BY STATE COURTS, THE RULE OF LAW ANNOUNCED IN MILKOVICH SHOULD BE ADOPTED AS PART OF THE FEDERAL CONSTITUTIONAL COMMON LAW OF LIBEL.**

Because of concerns that state libel laws invaded free speech rights protected by the First Amendment, this Court, in a long line of decisions starting with New York Times Co. v. Sullivan, has repeatedly raised constitutional barriers to recovery in defamation cases. In Milkovich, while recognizing and approving those prior barriers, this Court drew the line. It wisely recognized that there is "no wholesale defamation exception for anything that might be labeled 'opinion'". 497 U.S. 1, 18 (1990). If a statement is not provable as false or is not reasonably interpretable as stating facts, it cannot

form the basis of a libel suit. Id. 19-20. On the other hand, if the statement is provable as false and can reasonably be interpreted as stating actual facts about the person defamed, then the statement *is* actionable.

Petitioner urges this Court to adopt this holding as part of the federal common law of libel to ensure that the balance between the competing interests at stake in such cases is maintained.

This Court has frequently and eloquently recognized that the right of a person to protect his or her own reputation from unjustified invasion and wrongful hurt is "at the root of any decent system of ordered liberty". Milkovich, *supra* at 22, *quoting* Rosenblatt v. Baer, 383 U.S. 75, 92-93 (Stewart, J. concurring). In light of the infusion of constitutional interests into the common law of defamation, this

Court, consistent with the due process clause of the Fourteenth Amendment, should likewise recognize, in the context of libel cases, that the right to seek redress for reputational injury should itself receive basic constitutional protection. Specifically, Petitioner urges the proposition that no court should be free to merely declare a defamatory falsehood "opinion" (particularly under the guise of the malleable, standardless, unprincipled standard in Ohio's Scott case) and therefore immunize a defendant from liability, no matter how outrageous the statement and irrespective of the presence of actual malice. The standard set forth in Milkovich should be adopted as part of the constitutional federal common law of libel which no state court may ignore.

In Paul v. Davis, 424 U.S. 693

(1975), this Court held that "reputation alone" did not implicate any "liberty" or "property" interest sufficient to invoke the procedural protections of the Due Process Clause of the Fourteenth Amendment. However, the Court noted that property or liberty interests were protected if they were recognized under state law. Id. at 710 and fn. 5.

The Ohio Constitution recognizes the right to vindicate injury to reputation as a property or liberty interest:

> Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right[8] (emphasis supplied).

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[8]. In the Vail case, Associate Justice Paul Pfeifer, who concurred in the judgment only, noted that "the Ohio Constitution, unlike the federal Constitution, facially limits the breadth of free speech, and establishes rights for persons libeled. To hold that the Ohio Constitution provides more expansive protection for free speech than the federal Constitution is to ignore the obvious [and, as noted above, a well-established body of cases by the same court]. Unfortunately, the majority proves us with no constitutional analysis to support its claim." (emphasis and comment in brackets supplied.) Id. at 286.

In the intervening twenty years since Davis was decided, the law of defamation has been in large measure constitutionalized. In 1964, this Court observed that "'whatever is added to the field of libel is taken from the field of free debate'". New York Times, *supra* at 272, *quoting* Sweeney v. Patterson, 128 F.2d 457, *cert denied*, 317 U.S. 678 (1942). Since then, this Court has taken much from the "field of libel". Whether there has been any corresponding addition to the "field of free debate" is very questionable indeed. Nevertheless, the line was drawn and the "balance" was "held true" in Milkovich. The field must again be re-leveled here.

C. **THE DECISION IN THE CASE AT BAR IMPERMISSIBLY PRECLUDED PETITIONER FROM HAVING THE OPPORTUNITY TO VINDICATE HER REPUTATIONAL INJURY.**

The Supreme Court of Ohio did not mince words in its opinion below. It

said unequivocally that the "law in this State" was what it declared it to be in Scott, 25 Ohio St. 3d 243 (1986). 72 Ohio St. 3d 279, 281 (1995). In Scott the court adopted an ostensibly benign "totality of the circumstances" test where "at least" four factors were to be considered as a "compass . . . and not a map to set rigid boundaries". Id. at 250.[9] In the case at bar, the Court went even further saying that the

> standard must be fluid . . . Each of the four factors should be addressed, but the weight given to any one will conceivably vary depending on the circumstances presented.

Vail, *supra* at 282.

The three dissenters in Scott recognized the obvious problems that a standardless "flexible" approach to this

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[9]. These factors are (1) the specific language used; (2) whether the statement is "verifiable"; (3) the general context of the statement and (4) the "broader context" in which the statement was made or appeared. 25 Ohio St. 3d 243, 250 (1986).

"subtle and difficult question" would have. Ollman v. Evans, 471 U.S. 1127, 1129 (1985)(Rehnquist, C.J., dissenting). Former Chief Justice Celebrezze succinctly observed that the "test" was "not only unworkable [but] . . . is applied . . . in [a] self contradictory fashion to reach an untenable result". Id. at 263. Justice Clifford Brown went much further:

> [The] new 'test' [in Scott] is, in practice so malleable and spongy as to permit any interpretation anyone wishes. It will enable any judge or reviewing court to label any clearly libelous statement of fact as a statement of opinion and thereby for all practical purposes create absolute immunity for every congenital liar who publicly utters or writes slanderous or libelous statements. . . . [The] so-called four-factor test to determine if a defamatory statement is a statement of fact or opinion [is] vapid [and] meaningless. Where this issue exists in any libel trial in future cases involving the press as a defendant, the trial judge might as well simply direct a verdict for the defendant, or even better, routinely grant summary judgment motions made by the defense because, given the

> result of the case at bar, it is difficult to imagine what otherwise libelous statements of fact will remain actionable once they have been printed in the newspaper.
>
> The standardless four-factor test for distinguishing fact from opinion . . . makes every statement of fact a statement of opinion in every case and therefore not actionable. This is a deprivation of every libeled plaintiff's rights under both the Ohio Constitution and the United States Constitution.

Scott, *supra* at 275-276.

Not surprisingly, the so-called "totality of the circumstances" test in this case led to the conclusion that the statements in issue were "opinion" and not fact. Moreover, this was done in the context of a motion to dismiss where all allegations in Petitioner's complaint were presumed to be true.[10] The Supreme Court of Ohio said that there was "no

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[10]. Ohio R. Civ. Proc. 12(B)(6) is substantially identical to F.R.C.P. 12(b)(6). In both instances, the court is required to accept as true the well-pleaded allegations in the complaint. Cf. Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 174-175 (1965); Conley v. Gibson, 357 U.S. 41 (1957) and O'Brien v. University Community Tenants Union, 42 Ohio St. 2d 242 (1975).

question" that the statements were opinion because they were made by a "columnist". 72 Ohio St. 3d at 282. Further, the Court was persuaded that the "column" was written "in the midst of a political campaign". Id. Further, because the "general tenor" of the "column" was "sarcastic," this suggested that it was "more typical of persuasive speech than factual reporting".

Despite the fact that there was no evidence whatsoever in the record (because the case was decided on the functional equivalent of a F.R.C.P. 12(b)(6) motion), the Court said that the "author's reputation as an opinionated columnist should also be considered".[11]

---

[11]. Petitioner is not aware that respondent Dirck has a reputation known to the Supreme Court of Ohio of being "opinionated". Even if he "enjoys" such a reputation, this certainly does not mean that anything he says about anyone is *per se* immunized from the law of libel. This appears to be what the Supreme Court of Ohio intended.

Id. at 282.

In addition, the court said that in its view the language "cited by Vail to be actionable lacks precise meaning and would be understood by the ordinary reader for just what it is -- one person's attempt to persuade public opinion". Since the words complained of cannot be "defined with crystal clarity", the court believed the statements to be "opinion". Id. at 282.

Even the "veiled characterization" of Vail as a "liar", which the Court conceded could be "construed as communicating a fact" was disregarded because "this single phrase is insufficient to overcome the conclusion that an ordinary reader would believe that statement, just as the others, to be the opinion of the writer. Id. at 283.

The court then concluded that the statements were not "verifiable" despite

the fact that the case was before it on a motion to dismiss and despite the fact that Petitioner's complaint was, by law, presumed to be true. Id. at 283.

The foregoing analysis shows exactly why there is a need for a constitutional rule of decision regarding the claimed opinion privilege. Despite the fact that the defamatory statements published by the Respondents may be proved false and that any reasonable person would understand those statements to be stating actual facts about the Petitioner, she has been arbitrarily and unjustifiably denied the opportunity even to litigate her claims based on the Scott "test" applied in the context of a motion to dismiss.[12]

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[12]. Contrary to the Supreme Court of Ohio's assessment, the actionable statements made about Petitioner were neither imprecise nor variably interpretable; rather the statements were indisputably factual. Dirck thus wrote: "As this appears to be a cornerstone of her campaign, we'll put it real high so nobody misses it.

Petitioner's substantive right to due process under the Fourteenth Amendment has thus been abridged. What is more, there has been no corresponding benefit to society whatsoever (unless insulating the press from *any* liability for libel despite actual malice can be viewed as a societal "benefit"). The so-called "four-part test" applied by the court below is so "flexible" and standardless that no meaningful opportunity will ever again exist in Ohio for someone in Petitioner's position to

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Loren Loving Vail doesn't like gay people. Everybody got that? Good." (emphasis supplied). Similarly he stated: "Vail escalated it (i.e. challenging the propriety of an off-color, sexual remark reportedly made by Dagmar Celeste, the wife of the former governor of Ohio) into an anti-homosexual diatribe . . ." And he also wrote that Petitioner "latched onto homophobia as a ticket to Columbus." Each of these statements is easily provable as false and cannot fairly be said to contain "loosely definable, variously interpretable statements of opinion made extricably in the context of political, social or philosophical debate". Buckley v. Littell, 539 F.2d 882, 896 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1976). Accordingly, they are actionable.

vindicate her good name and to obtain redress for harm caused by the defamatory falsehoods published about her.

A reasonable assessment of Respondents' statements, as opposed to the tortured analysis undertaken by the Supreme Court of Ohio, readily leads to the conclusion that the statements are and should be actionable under Milkovich. By directing the focus to whether a statement may be proved false and whether the statement may reasonably be interpreted as making factual assertions about a person, the inherent uncertainty of subjective linguistic analysis can be avoided altogether.

The statements in issue here were not merely descriptive "of a wide range of emotions and attitudes about a wide range of issues related to homosexuality" (Respondent's Brief to the Supreme Court of Ohio at 32). Rather, the statements

(which the Ohio Court of Appeals found were actionable[13]) and which Petitioner contends are clearly actionable under Milkovich, were quite clearly factual in nature (i.e. capable of being proven true or false) and were clearly made in such a way as to reasonably construed to be actual facts about the Petitioner.

In deciding whether to grant Petitioner's request for a writ of certiorari, it is well to remember that one's reputation is something that most people spend a lifetime building and protecting. One's reputation is also something which can easily be snuffed out and the consequences are devastating.

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[13]. The Court of Appeals held as follows: "We find actionable, under the constraints of a motion to dismiss, the statements that Vail dislikes homosexuals, engaged in an 'anti-homosexual diatribe' and fostered homophobia in an attempt to be elected. These statements are capable of being proven false and could reasonably be interpreted as stating actual facts about Vail". Opinion at 7.

This fact was recognized in Shakespeare's Othello where Iago says to Othello:

> Good name in man and woman, dear my lord,
>
> Is the immediate jewel of their souls.
>
> Who steals my purse steals trash;
>
> 'Tis something, nothing;
>
> Twas mine, 'tis his, and has been slave to thousands;
>
> But he that filches from me my good name
>
> Robs me of that which not enriches him,
>
> And makes me poor indeed.

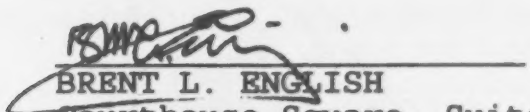
Act III, scene 3.

CONCLUSION

Petitioner Loren Loving Vail respectfully requests that this Court grant her petition to consider the important questions presented herein and to correct a serious injustice which has

precluded her from having her libel case heard on the merits.

Respectfully submitted,



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APPENDIX

THE SUPREME COURT OF OHIO

1995 TERM

To wit: May 31, 1995

Loren Loving Vail, Appellee,	:	Case No. 93-1959
v.	:	JUDGMENT ENTRY
The Plain Dealer Publishing Company et al., Appellants.	:	APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed consistent with the opinion rendered herein.

It is further ordered that the appellants recover from the appellee their costs herein expended; and that a mandate be sent to the Court of Common Pleas for Cuyahoga County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

COSTS:
Docket Fee, $40.00, paid by Baker & Hostetler.

(Cuyahoga County Court of Appeals; No. 63223)

/s/
THOMAS J. MOYER
Chief Justice

DECISION OF THE SUPREME COURT OF OHIO REVERSING JUDGMENT OF THE OHIO COURT OF APPEALS

VAIL, APPELLEE, v. THE PLAIN DEALER PUBLISHING COMPANY ET AL., APPELLANTS.

[Cite as Vail v. The Plain Dealer Publishing Co. (1995), 72 Ohio St.3d 279.]

Defamation -- When determining whether speech is constitutionally protected opinion, court must consider totality of the circumstances.

When determining whether speech is protected opinion a court must consider the totality of the circumstances. Specifically, a court should consider: the specific language at issue, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared. (*Scott v. News Herald* [1986], 25 Ohio St.3d 243, 25 OBR 302, 496 N.E.2d 699, approved

and followed; Section 11, Article I of the Ohio Constitution, applied.)

See: West's Ohio Digest, Libel and Slander 6(1).

(No. 93-1959 -- Submitted January 11, 1995 -- Decided May 31, 1995.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 63223.

Appellee, Loren Loving Vail, instituted her action after appellant The Plain Dealer Publishing Company ("Plain Dealer") published a column authored by appellant Joe Dirck, concerning Vail's 1990 campaign for the Ohio Senate. Vail's complaint advanced causes of action sounding in defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress. Attached to and

incorporated by reference in her complaint were a copy of the Dirck column and a copy of a press release issued by Vail's campaign office that allegedly prompted the column.

The article appeared in the Forum section of the October 19, 1990 edition of The Plain Dealer. Immediately preceding the article, at the top of the column, appeared a picture of Dirck bearing his name and the caption "Commentary." In the article, entitled "Gay-basher takes refuge in the closet," Dirck stated: "Loren Loving Vail doesn't like gay people" and that she "* * * has added gay-bashing to the repertoire of right-wing, neo-numbskull tactics she is employing * * * in her increasingly distasteful campaign against Democrat Eric Fingerhut." Dirck characterized Vail's comments concerning a speech given by Dagmar Celeste as an "anti-homosexual diatribe," and claimed that "Vail

wouldn't be the first candidate to latch onto homophobia as a ticket to Columbus." Finally, Dirck ended his column by writing, "[h]aving learned long ago never to underestimate the neo-numbskull vote, I won't hazard a guess on whether her hate-mongering will work. But although I personally don't have much use for bigots of any sort, I have a particular problem with those who can't even be up front about it. Honesty, it would appear, is one value on which Vail is not so 'pro.'"

Upon motion of Dirck and The Plain Dealer, the trial court dismissed the action for failure to state a claim. The court of appeals reversed, holding that the terms "gay-basher," "neo-numbskull," "bigot," "hate-mongering," and the inference of dishonesty cited in Vail's complaint were not actionable, but that Dirck;s description of Vail as "dislik[ing] homosexuals," of "engag[ing] in an 'anti-homosexual diatribe,'" and of

"foster[ing] homophobia" in an attempt to be elected did state actionable claims of defamation and intentional infliction of emotional distress. The court of appeals reasoned that because the statements were capable of being proven false, Vail had asserted a valid cause of action.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Baker & Hostetler, David L. Marburger and *Beth A. Brandon,* for appellants.

MOYER, C.J. Our standard of review when presented with a motion to dismiss predicated on Civ. R. 12(B)(6) is well established. The factual allegations of the complaint and items properly incorporated therein must be accepted as true. Furthermore, the plaintiff must be afforded all reasonable inferences

possibly derived therefrom. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756. It must appear beyond doubt that plaintiff can prove no set of facts entitling her to relief. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, syllabus. However, the determination of whether allegedly defamatory language is opinion or fact is a question of law to be decided by the court. *Scott v. News-Herald* (1986), 25 Ohio St.3d 243, 250, 25 OBR 302, 308, 496 N.E.2d 699, 705.

The issue in this case is whether the trial court properly dismissed Vail's complaint because the averred defamatory statements are constitutionally protected as opinion. The resolution of this question requires us to revisit our decision in *Scott v. News-Herald, supra*.

Section 11, Article I of the Ohio Constitution provides in relevant part:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." In *Scott* we stated in effect that expressions of opinion are generally protected under Section 11, Article I of the Ohio Constitution as a valid exercise of freedom of the press. *Scott v. News-Herald, supra,* at 244-245, 25 OBR at 303-304, 496 N.E.2d at 701-702. We held as constitutionally protected opinion a columnist's inference that a school superintendent was less than truthful. Superintendent Scott was involved in the events that led to the imposition of sanctions against the school's wrestling team. The News Herald columnist insinuated that Scott lied at a subsequent hearing convened to determine whether the school was afforded due

process prior to the suspension. Notwithstanding *dicta* stating the article was protected opinion under the First Amendment to the United States Constitution, our holding was premised on Section 11, Article I of the Ohio Constitution. *Scott, supra,* at 244, 25 OBR at 303, 496 N.E.2d at 701.

Subsequent to our announcement in *Scott,* the United States Supreme Court decided the related case of *Milkovich v. Lorain Journal Co.* (1990), 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1. Milkovich, the wrestling team coach, was also involved in the due process hearing that generated the *Scott* case, *supra.* The column at issue in *Scott* also addressed Milkovich's alleged untruthfulness. The Supreme Court held that "opinion" is afforded no additional protection under the United States Constitution, *id.* at 21, 110 S.Ct. at 2707, 111 L.Ed.2d. at 19, and that the

actual malice standard of *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, strikes the proper balance between freedom of the press and the protection of one's reputation as applied to public officials and public figures, *id.* at 14-17, 110 S.Ct. at 2703-2705, 111 L.Ed.2d at 14-17. The *Milkovich* court determined that the language was actionable because a reasonable fact-finder could conclude that an implication of perjury was made in the column. *Id.* at 21, 110 S.Ct. at 2707, 111 L.Ed.2d at 19. The court also held that perjury was a factual allegation that could be proven to be true or untrue. *Id.* Citing *Philadelphia Newspapers, Inc. v. Hepps* (1986), 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783, the court reasoned that a statement on matters of public concern must be provable as false before there can be liability under the law of defamation.

Id. at 16, 110 S.Ct. at 2704, 111 L.Ed.2d at 16. As such, the United States Supreme Court reached a different conclusion from an application of the First Amendment to the United States Constitution than we had reached in *Scott* applying the Ohio Constitution.

Regardless of the outcome in *Milkovich*, the law in this state is that embodied in *Scott*. The Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press. However, we do not perceive this distinction to be as great as it may appear. As Justice Brennan observed in his dissent to *Milkovich*, the factors used to determine whether a statement implies actual facts "are the same indicia that lower courts have been relying on * * * to distinguish between statements of fact and statements of opinion: the type of language used, the

meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made." *Id.* at 24, 110 S.Ct. at 2709, 111 L.Ed.2d at 21. While it may be considered a distinction without a difference, it does alter the method of analysis. The focus shifts to whether the language under question is to be categorized as fact or opinion.

In *Scott* we adopted a totality of the circumstances test to be used when determining whether a statement is fact or opinion. Specifically, the court should consider: the specific language used, whether the statement is verifiable, the general context of the statement, and finally, the broader context in which the statement appeared. *Scott, supra*, at 250, 25 OBR at 308, 496 N.E.2d at 706. This analysis is not a bright-line test, but does establish parameters within which each statement or

utterance may stand on its own merits rather than be subjected to a mechanistic standard. As Justice Locher, writing for the court, cautioned in *Scott*, "the totality of the circumstances test * * * can only be used as a compass to show general direction and not a map to set rigid boundaries." *Id.*

Furthermore, the standard must be fluid. Every case will present facts that must be analyzed in the context of the general test. Each of the four factors should be addressed, but the weight given to any one will conceivably vary depending on the circumstances presented.

We begin by analyzing the context in which Dirck's statements appear. There can be no question that the general context in which the columnist's statements were made is opinion. The column appears on the Forum page of the newspaper, and is titled "Commentary."

The words "forum" and "commentary" convey a message that the reader of columns so designated will be exposed to the personal opinions of the writer. Such a column is distinguished from a news story which should contain only statements of fact or quotes of others, but not the opinion of the writer of the story. Furthermore, the Dirck column appeared in the midst of a political campaign, which provided the subject for the column.

Assuming the general context of the Dirck column is opinion, that conclusion does not dispose of the legal issue. Second, we must consider the full context of the statements. Is the column characterized as statements of objective facts or subjective hyperbole? The general tenor of the column is sarcastic, more typical of persuasive speech than factual reporting. The column is prefaced with the author's name appearing above his picture and the word

"Commentary" appearing below it. The author's reputation as an opinionated columnist should also be considered.

Third, the specific language used must be reviewed, focusing on the common meaning ascribed to the words by an ordinary reader. We must determine whether a reasonable reader would view the words used to be language that normally conveys information of a factual nature or hype and opinion; whether the language has a readily ascertainable meaning or is ambiguous. We believe the language cited by Vail to be actionable lacks precise meaning and would be understood by the ordinary reader for just what it is -- one person's attempt to persuade public opinion. The same is true of the passages cited by the court of appeals in support of its conclusion. Engaging in "an anti-homosexual diatribe" and fostering "homophobia" can hardly be defined with crystal clarity. Each term

conjures a vast array of highly emotional responses that will vary from reader to reader. None is similar to the typical examples of punishable criminal or disciplinary conduct cited as actionable language. Dirck's veiled characterization of Vail as a liar could be construed as an objective statement. The average reader could construe this language as communicating a fact. This is particularly relevant given that under Civ. R. 12(B)(6) we must construe all inferences in favor of Vail. However, we conclude this single phrase is insufficient to overcome the conclusion that an ordinary reader would believe that statement, just as the others, to be the opinion of the writer.

The final question is whether the statements are verifiable. Does the author imply that he has first-hand knowledge that substantiates the opinions he asserts? Where the "'* * * statement

lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content.'" *Scott* at 251-252, 25 OBR at 309, 496 N.E.2d at 707, citing *Ollman v. Evans* (C.A.D.C.1984), 750 F.2d 970, 979. Again, only the references to Vail's honesty are possibly verifiable facts and we do not find them, in the context in which they were written, to support a cause of action. The language used by Dirck is value-laden and represents a point of view that is obviously subjective.

Based upon the totality of the circumstances, we are convinced that the ordinary reader would accept this column as opinion and not as fact. Therefore, the statements are protected under Section 11, Article I of the Ohio Constitution.

Since we have concluded that the statements at issue are constitutionally

protected speech, Vail's claims for intentional infliction of emotional distress must also fail.

For the foregoing reasons, the judgment of the court of appeals is reversed.

Judgment reversed.

DOUGLAS, WRIGHT, RESNICK, F.E. SWEENEY and COOK, JJ., concur.

DOUGLAS and WRIGHT, JJ., concur separately.

PFEIFER, J., concurs in judgment only.

DOUGLAS, J., concurring. There are a number of reasons the decision in this case should be reversed. I do not reach additional reasons, given that the column in question is clearly opinion and, as such, the comments enjoy absolute protection from allegations of defamation.

The well-reasoned majority opinion relies, and properly so, on *Scott v. News-Herald* (1986), 25 Ohio St.3d 243, 25 OBR 302, 496 N.E.2d 699. I concurred in *Scott* and indicated, in part, that speech that is "opinion enjoys the protection afforded such speech by the First Amendment." *Id.* at 255, 25 OBR at 312, 496 N.E.2d at 709. Once a determination is made that specific speech is "opinion," the inquiry is at an end. It is constitutionally protected.

What I said in *Scott* bears, I believe, repeating. In "preserving the freedoms of speech and press, guaranteed by the First Amendment, we must accord protection to the expression of ideas we abhor or sooner or later such protection of expression will be denied to the ideas we cherish." *Id.* at 260, 25 OBR at 317, 496 N.E.2d at 714.

WRIGHT, J., concurring. I write separately not out of disagreement with

some aspect of the Chief Justice's opinion, but to stress its stated underpinnings -- Section 11, Article I of the Ohio Constitution. Time and again, but never more clearly than today, we have stressed that the protections accorded opinion under the Ohio Constitution are broader than the First Amendment jurisprudence developed by the United States Supreme Court.[1]

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[1]. Justice Locher, speaking for the court, first developed this view in *Scott v. News-Herald* (1986), 25 Ohio St.3d 243, 244, 25 OBR 302, 303, 496 N.E.2d 699, 701: "We find the article to be an opinion protected by Section 11, Article I of the Ohio Constitution as a proper exercise of freedom of the press." See, also, *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, paragraph one of the syllabus, where Justice Douglas, writing for the court, emphasized the independent importance of our state's Constitution: "The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which the state court decisions may not fall." Other cases of this court have similarly stressed the importance of protecting free speech. See, *e.g.*, *Varanese v. Gall* (1988), 35 Ohio St.3d 78, 83, 518 N.E.2d 1177, 1183, certiorari denied (1988), 487 U.S. 1206, 108 S.Ct. 2849, 101 L.Ed.2d 886 ("[W]e emphasize that acceptance of appellee's argument would necessarily impose restrictions on constitutionally guaranteed freedoms of expression, a position which we must be extremely reluctant to take. The very notion of a court interfering with the free flow of debate on

It is not our purpose to enshrine the columnists and editorial writers of this state. Personally, I have a fair amount of empathy for embattled public figures. However, we must never lose sight of the simple truth that the very stability and vitality of our system of government depends upon the vigorous protection of the free expression of ideas. As I stated in *Scott v. News-Herald* (1986), 25 Ohio St.3d 243, 25 OBR 302, 496 N.E.2d 699: "I believe the framers of our Constitution felt that an informed electorate was the genius of our system. Thus, in my view, free speech is the brightest star in our constitutional constellation." *Id.* at 261, 25 OBR at 317, 496 N.E.2d at 714 (Wright, J., concurring). Similarly, in a comment

---

matters of profound public concern is repugnant to our democratic way of life. We should never forget that an unfettered press is the custodian of all our liberties and the guarantor of our progress as a free society.").

equally applicable to today's case, I wrote: "A free and vigorous press must be maintained even at a high cost. The very nature of daily reporting of a political campaign or of volatile public issues negates the likelihood that the coverage will always be free from inaccuracy or even bias and, thus, error becomes the unfortunate by-product of virtually every political dispute. In spite of the inevitable errors which are likely to surface, the media performs a necessary and vital function within the political process." *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 94-95, 31 OBR 250, 259, 509 N.E.2d 399, 407-408.

PFEIFER, J., concurring in judgment only. In reversing this court in *Milkovich v. Lorain Journal Co.* (1990), 497 U.S. 1, 19, 110 S.Ct. 2695, 2706, 111 L.Ed.2d 1, 18, the United States Supreme Court rejected the idea developed by this court in *Scott v. News-Herald* (1986), 25

Ohio St.3d 243, 25 OBR 302, 496 N.E.2d 699, that an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. Now, revisiting the issue for the first time since the Supreme Court's *Milkovich* rebuke, this court holds that while it may have been wrong about the federal Constitution in *Scott*, the Ohio Constitution separately and independently creates a special protection for opinion. While the majority in *Scott* did pay lip service to the Ohio Constitution, the decision in that case was based entirely on the majority's interpretation of federal law, an interpretation which the United States Supreme Court later determined was misguided.

Today's opinion, then, relies completely on the naked assertion that Section 11, Article I of the Ohio Constitution provides greater protection

for the publishing of opinions than the First Amendment to the federal Constitution. That assertion ignores that the Ohio Constitution essentially constitutionalizes criminal and civil causes of action for libel. The familiar words of the First Amendment read, in pertinent part:

"Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

Section 11, Article I of the Ohio Constitution, on the other hand, is more restrictive, warning Ohioans as to the boundaries of free speech:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of the right*; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it

shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted." (Emphasis added.)

Thus, on its face the Ohio Constitution is more restrictive as to speech than the federal Constitution. While protecting speech from government interference on the one hand, the Ohio Constitution also, however, establishes individual *liability* for the abuse of that right. It also legitimizes criminal actions for libel by recognizing a truth defense in such actions.

The Ohio Constitution, unlike the federal Constitution, facially limits the breadth of free speech, and establishes rights for persons libeled. To hold that the Ohio Constitution provides more expansive protection for free speech than the federal Constitution is to ignore the obvious. Unfortunately, the majority

provides us with no constitutional analysis to support its claim.

The majority attempts to minimize the import of its decision by claiming that its break from federal law yields a "distinction without a difference," as if the irrelevance of today's holding should make it more palatable. The fact is that no *distinction* is necessary. To disagree with the majority in this case does not mean that pure opinion is unprotected. "[T]he '"breathing space"' which '"[f]reedoms of expression require in order to survive"' * * * is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact." *Milkovich*, 497 U.S. at 19, 110 S.Ct. at 2706, 111 L.Ed.2d at 18.

Under federal law, where a media defendant is involved, "a statement on matters of public concern must be provable as false before there can

be liability under state defamation law * * *." *Milkovich*, 497 U.S. at 19, 110 S.Ct. at 2706, 111 L.Ed.2d at 18. Second, "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual" are constitutionally protected. *Milkovich*, 497 U.S. at 20, 110 S.Ct. at 2706, 111 L.Ed.2d at 19. Finally, "where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth." 497 U.S. at 20, 110 S.Ct. at 2706-2707, 111 L.Ed.2d at 19.

Under this framework, I agree with the majority that The Plain Dealer article is not actionable. There is no way to conclusively prove exactly *how* Loren Loving Vail feels about

homosexuals. The rest of Dirck's statements are characterizations, which again, although they may be hyperbolic, are not prova e as false.

The majority opinion delves into context, and thus unnecessarily enters treacherous territory. Columnists should not enjoy any greater First Amendment protection than anyone else if they publish provably false statements concerning an individual, when the statements are made with knowledge of their falsity or with reckless disregard of their truth. Newspapers should not be shielded from liability for printing lies by labeling them as commentary.

Especially in Ohio, where there is a constitutionally recognized balance between the rights of the publisher of a statement and the rights of the subject of that statement, we should adopt the federal standard enunciated in *Milkovich*. This court in *Scott* meant to bring Ohio

in line with federal law, but got lost along the way. The majority in this case squanders the opportunity to get back on track.

JOURNAL ENTRY AND OPINION
OF THE COURT OF APPEALS FOR THE EIGHTH
JUDICIAL DISTRICT, CUYAHOGA COUNTY, OHIO

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 63223

LOREN LOVING VAIL	:	
	:	
Plaintiff-appellant	:	
	:	JOURNAL ENTRY
-vs-	:	AND
	:	OPINION
THE PLAIN DEALER	:	
PUBLISHING	:	
COMPANY, ET AL.	:	
	:	
Defendant-appellees	:	

DATE OF ANNOUNCEMENT
OF DECISION: JULY 22, 1993

CHARACTER OF
PROCEEDING: CIVIL APPEAL FROM THE COMMON PLEAS COURT CASE NO. CV-214325

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

DATE OF JOURNALIZATION: AUGUST 1, 1993

APPEARANCES:

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SPELLACY, P.J.:

Plaintiff-appellant Loren Loving Vail appeals the dismissal, under Civ. R. 12(B)(6), of her action against defendants-appellees Plain Dealer Publishing Company and Joseph Dirck. Vail raises the following assignment of error:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING APPELLEES' MOTION TO DISMISS SINCE, FROM THE FACE OF HER COMPLAINT, SHE STATED VALID CLAIMS FOR DEFAMATION AND TORTIOUS INFLICTION OF SERIOUS EMOTIONAL DISTRESS.

We find this assignment of error has some merit. As a result, we affirm the judgment in part, reverse the judgment in part, and remand the cause for further proceedings.

I.

Vail brought this action for defamation, intentional infliction of emotional distress, and negligent

infliction of emotional distress after the Plain Dealer published a column authored by Dirck concerning Vail's 1990 campaign for the Ohio State Senate. Vail attached a copy of the column (Exhibit B) to her complaint and alleged the following statements were defamatory and constituted intentional and negligent infliction of emotional distress:[1]

> 1. Gay-basher takes refuge in the closet. [the column's title] As this appears to be a cornerstone of her campaign we'll put it real high so nobody misses it ***.
>
> 2. *** Vail doesn't like gay people.
>
> 3. Vail *** has added gay-bashing to the repertoire of right wing, neo-numbskull tactics she is employing in her increasingly distasteful campaign ***.
>
> 4. Vail similarly interjected herself into the controversy over the speech [sic] governor's wife Dagmar Celeste gave to a gay group *** Vail

---

[1]A copy of the column (Exhibit B) is

escalated into an anti-homosexual diatribe ***.

5. Vail wouldn't be the first candidate to latch onto homophobia as a ticket to Columbus.

6. I won't hazard a guess on whether her hate-mongering will work.

7. But although I personally don't have much use for bigots of any sort. I have a particular problem with those who can't even be up front about it.

8. Honesty, it would appear, is on value one which Vail is not so pro.

The Plain Dealer and Dirck moved to dismiss under Civ. R. 12(B)(6), arguing Vail failed to state a claim on which relief could be granted because the statements were nonactionable. The trial court granted the motion and dismissed the action.

II.

In her assignment of error, Vail contends the trial court erred when it

dismissed her complaint because she stated valid claims for defamation and tortious infliction of emotional distress.

"A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. A complaint satisfies this test unless, after presuming all factual allegations contained in the complaint are true, it appears beyond doubt that no set of facts can be proven entitling the plaintiff to relief. *Tulloh v. Goodyear Atomic Corp.* (1992), 62 Ohio St.3d 541, 544; citing *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus.

We begin with Vail's defamation claim. Defamation is a false publication injurious to a person's reputation. *Dale*

v. Ohio Civ. Ser. Emp. Assn. (1991), 57 Ohio St.3d 112, 117. Whether statements alleged to be defamatory are actionable is a question of law for the court. *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 372. In making this determination, the trial court examines the statements under the totality of the circumstances, *Scott v. News Herald* (1986), 25 Ohio St.3d 243, 253, and in the context of the entire publication. *Mendise v. Plain Dealer Publishing Co.* (1990), 69 Ohio App.3d 721, 726. The trial court must also adopt an innocent meaning if one exists. *Yeager*, 6 Ohio St.3d at 372; *Mendise*, 69 Ohio App.3d 726. In carrying out this task courts look to the literal meaning of the statements. *Yeager*, 6 Ohio St.3d at 372; *Celebrezze v. Dayton Newspapers, Inc.* (1988), 41 Ohio App.3d 343, 346; *National Rifle Assn. v. Dayton Newspapers, Inc.*

(S.D. Ohio 1983), 555 F. Supp. 1299, 1307.

The First Amendment limits the application of state defamation law. *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254. Recently, in *Milkovich* v. *Lorain Journal Co.* (1990), 497 U.S. 1, 16-20, the Supreme Court recognized two relevant protections afforded by the First Amendment. First, *Milkovich* reaffirmed the principle established in *Philadelphia Newspapers Inc.* v. *Hepps* (1986), 475 U.S. 767, 776, that a statement made by a media defendant is protected, and thus nonactionable, when it is incapable of being proven false. *Milkovich*, 497 U.S. at 16. Second, *Milkovich* emphasized that a statement is protected, and nonactionable, when it cannot " 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich*, 497 U.S. at 21,

citing *Hustler Magazine v. Falwell* (1987), 485 U.S. 45, 50. The Supreme Court noted that "[t]his provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20.

Applying the first principle recognized by *Milkovich*, the court in *Phantom Touring, Inc. v. Affiliated Publications* (C.A.1, 1992), 953 F.2d 724, 728, found that the terms "a rip-off, a fraud, a scandal, a snake-oil job" were incapable of being proven false because it could "imagine no objective evidence to disprove [the terms]" and the terms "fake" and "phony" were incapable of being proven false because they are adjectives "admit[ting] of numerous interpretations." Earlier, in *Buckley v.*

Littel (C.A. 2, 1976), 539 F.2d 888, 893, the court found "fascist" and "radical right" incapable of being proven false "because of the tremendous imprecision of the meaning and usage of the terms in the realm of political debate ***."

A number of courts have applied the second principle recognized by *Milkovich*. In *Letter Carriers v. Austin* (1974), 418 U.S. 264, 284-286, the Supreme Court held that the use of "traitor" to describe a union "scab" in a newsletter was nonactionable because the term was used in its "loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose[d] unionization" and no reader would have understood the newsletter was "charging the [plaintiff] with committing the criminal offense of treason." In *Greenbelt Coop. Publ. Asso. v. Bresler* (1970), 398 U.S. 6, 14, The

Supreme Court held that the statement that the plaintiff was "blackmailing" the local government was protected where "[n]o reader could have thought that *** [the plaintiff was being charged] with the commission of a criminal offense" and "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the plaintiff's] negotiating position extremely unreasonable."

In Ohio, *Yeager* found that signs and handbills describing the plaintiff as being a "Little Hitler" and accusing him of operating "a Nazi concentration camp," and using "Gestapo" tactics was nonactionable because no one would believe the plaintiff "was literally a member of the Nazi Party, the Gestapo, the SS or was like Hitler ***." *Yeager*, 6 Ohio St.3d at 372. In *Celebrezze*, the

court found a political cartoon depicting a drive-by shooting of the Ohio State Bar Association by a car with the name of a candidate for the Ohio State Supreme Court on its license plate was nonactionable where a reasonable person could not conclude the cartoon was accusing the candidate of murder or attempted murder. *Celebrezze*, 41 Ohio App.3d at 346.

We now turn to the statements alleged to be defamatory. We find actionable, under the constraints of a motion to dismiss, the statements that Vail dislikes homosexuals, engaged in an "anti-homosexual diatribe," and fostered homophobia in an attempt to be elected. These statements are capable of being proven false and could reasonable be interpreted as stating actual facts about Vail.

We find the remaining statements

nonactionable. The terms "hate-monger" and "bigot" are, like the terms in *Phantom* and *Buckley*, too vague and imprecise to be capable of being proven false. The statement questioning Vail's honesty is also incapable of being proven false because it rests on the allegation that she is a bigot. Further, the statements containing "gay-basher" could not reasonably be interpreted to state facts about Vail. Webster's New Collegiate Dictionary (1976) 92, defines "bash" as follows:

> *** to strike violently; HIT; also: to injury or damage by striking; SMASH - *** CRASH
>
> ***
>
> *** a forceful blow *** a festive social gathering; PARTY *** an important sports contest ***: TRY, ATTEMPT.

No reasonable reader of the column could

believe it accused Vail of violently striking homosexuals.

Next we address Vail's intentional infliction of emotional distress claim. When public figures are involved, First Amendment protections apply with equal force to intentional infliction of emotional distress claims as they do to defamation claims. *Falwell*, 485 U.S. at 879. Consequently, Vail's claims for intentional infliction of emotional distress claims based on nonactionable statements fail. Her claims based on actionable statements, however, remain.

Finally, we address Vail's negligent infliction of emotional distress claim. We find it to be unavailable. If First Amendment protections apply to intentional infliction of emotional distress claims, then they must also apply to negligent infliction of emotional distress claims. See *Falwell*,

485 U.S. at 56. To prevail on her claim, therefore, Vail must demonstrate the statements were published with "actual malice," which requires a showing of either knowledge that the statements were false or reckless disregard as to their truthfulness. *Id.*, citing *New York Times Co. v. Sullivan* (1964), 376 U.S. 254. A claim for negligence is unable to support such a demonstration.

Accordingly, Vail's assignment of error is well taken to the extent indicated above.

Judgment affirmed in part, reversed in part, and cause remanded for further proceedings.

It is ordered that the parties split the costs herein taxed.

The Court finds there was reasonable grounds for this appeal. It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

HARPER, J. AND
PORTER, J. CONCUR

/s/
LEO M. SPELLACY
PRESIDING JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO (January 13, 1992)

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LOREN LOVING VAIL,	)	
	)	
Plaintiff,	)	CASE NO. 214325
	)	
vs.	)	Judge Feighan
	)	
PLAIN DEALER PUBLISHING, et al.	)	**JOURNAL ENTRY**
	)	
	)	
Defendant.	)	

Defendants' Motion to Dismiss filed August 16, 1991, is granted.

/s/ Robert E. Feighan
Judge

FORUM
ON PAGE 5-B

JOE DIRCK

COMMENTARY

10-19-90 18

Gay-basher takes refuge in the closet

As this appears to be a cornerstone of her campaign, we'll put it real high so nobody misses it: Loren Loving Vail doesn't like gay people. Everybody got that? Good.

Despite earlier disavowals that she would do so, Vail, a Republican running for the 25th District seat in the Ohio Senate, has added gay-bashing to the repertoire of right-wing, neo-numbskull tactics she is employing in her increasingly distasteful campaign against Democrat Eric Fingerhut.

Her latest eruption came this week, when she got on her high horse about Lorain Catholic High School adding the words "born and unborn" to the end of the Pledge of Allegiance. Although Lorain is a long way from the East Side 25th District, Vail issued a news release defending the school's First Amendment rights and blasting "the minority far left individuals who attack those who want to return value consciousness and stability to their society."

Now, I'm all for the First Amendment, but I think Vail is a little confused. No one on the left, to my knowledge, was challenging the school's right to free speech. Representatives of both the American Civil Liberties Union and the National Organization for Women, in fact, defended that very right. Those who would outlaw the things with which they disagree more often than not come from Vail's end of the political spectrum.

This might have been just another example of an opportunistic candidate trying to get a little mileage out of a momentarily hot issue, but Vail also took the occasion to make another pitch for the homophobic vote, attacking the Gay People's Chronicle for a recent editorial criticizing Lorain Catholic and for a cartoon poking fun at Vail's "pro-values" campaign.

Calling the cartoon "obscene" (the neo-numbskulls toss that word around a lot, but this particular cartoon doesn't even come close), Vail couldn't resist noting in closing that her opponent, "Mr. Fingerhut, and his far left agenda, is supported by (the Chronicle)."

Deja vu. Last June, Vail similarly interjected herself into the controversy over the speech governor's wife Dagmar Celeste gave to a gay group in Cincinnati. Although many, including myself, questioned the propriety of the language Celeste used in a public setting, Vail escalated it into an anti-homosexual diatribe, and again tried to nail Fingerhut on a guilt-by-association rap.

"Dear Media," she coyly added to the end of her June news release, "I have only heard, not read, that my opponent, Mr. Fingerhut, has been endorsed by the Gay People's Chronicle. Could you please check this out for me? Thank you."

Well, maybe her strategy will work. Vail wouldn't be the first candidate to latch onto homophobia as a ticket to Columbus. She need look no farther than Parma, where Sen. Gary Suhadolnik has developed it into an art form. He's such an outspoken and vitriolic gay-hater you wonder what a psychiatrist would have to say about it.

The only thing I don't understand is why, when she was asked about the Dagmar incident during an interview at The Plain Dealer, Vail went to such lengths to deny any intention to use gay-bashing as a campaign tactic. Why, goodness no, she insisted, that was the farthest thing from her mind.

Of course, she could understand how someone reading her comments might have gotten that impression, but she's not the sort of person to take political advantage of prejudice and mindless hatred directed at a particular group of people. She certainly would be more careful in the future, she promised the folks here.

So much for promises. Having learned long ago never to underestimate the neo-numbskull vote, I won't hazard a guess on whether her hate-mongering will work.

But although I personally don't have much use for bigots of any sort, I have a particular problem with those who can't even be up front about it.

Honesty, it would appear, is one value on which Vail is not so "pro."

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Supreme Court, U.S.
FILED
NOV 22 1995
CLERK

No. 95-491

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

LOREN LOVING VAIL,
Petitioner,

vs.

THE PLAIN DEALER PUBLISHING COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

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46 pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court may review a decision of the Supreme Court of Ohio that rests upon adequate and independent state grounds.

2. Whether this Court may review a state court judgment to address purported federal claims which the petitioner failed to raise in the state courts below and which those courts did not independently address.

3. Whether this Court may review a state court judgment to address insubstantial federal claims.

COUNTER-STATEMENT OF THE PARTIES TO THE PROCEEDING

Petitioner Vail was a candidate for the 25th District seat in the Ohio Senate in the November 1990 general election. The 25th District encompasses portions of eastern Cuyahoga County, Ohio.

Respondent Plain Dealer Publishing Company publishes *The Plain Dealer*, a metropolitan newspaper circulated daily to the general public in Cuyahoga County and elsewhere.

The remaining two respondents are Joe Dirck, a Plain Dealer columnist, and Thomas Greer, Vice President and Senior Editor for the Plain Dealer.

RULE 29.1 LISTING

The Plain Dealer Publishing Company has no publicly traded parent or subsidiary.

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28 U.S.C. § 1257 . . . . . 1, 18

COUNTER-STATEMENT ON JURISDICTION

This Court lacks jurisdiction under Article III of the United States Constitution because the Ohio Supreme Court expressly decided the case on independent and adequate state constitutional grounds. The Court also lacks jurisdiction because the petitioner did not raise her purported federal claims in the state courts below, nor did those courts address those claims, and because those claims are not substantial federal questions as required under 28 U.S.C. § 1257.

No. 95-491

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

LOREN LOVING VAIL,
Petitioner,

vs.

THE PLAIN DEALER PUBLISHING COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to 28 U.S.C. § 1257 set forth by petitioner, the following are involved:

Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be

made, under their Authority, ... to Controversies ... between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article I, Section 11 of the Ohio Constitution provides:

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.

COUNTER-STATEMENT OF THE CASE AND FACTS

Petitioner Loren Loving Vail filed this suit in the Cuyahoga County Court of Common Pleas on July 18, 1991. Vail sued the Plain Dealer Publishing Company, and two Plain Dealer employees, Joseph Dirck and Thomas Greer (collectively, "the Plain Dealer"), for libel and infliction of emotional distress over a newspaper column written by Dirck and published on October 19, 1990.

In his regular column, Dirck, a political commentator, criticized Vail's campaign for election to the Ohio Senate. His October 19 column appeared a few weeks before the upcoming election. Vail was an outspoken advocate of "family values" during her campaign, and had criticized the Gay People's Chronicle and the social views of its editor. Dirck contrasted the statements in Vail's press releases castigating the Gay People's Chronicle with Vail's later denials that she had adopted "gay bashing" as a campaign tactic.

Vail has sued over Dirck's criticism. Vail does not claim that Dirck quoted her press releases inaccurately, or that Dirck inaccurately reported that, in an interview at the Plain Dealer, she denied attacking gays during her political campaign.

Contrary to the representation in her petition, Vail's complaint lists only the following characterizations by Dirck as actionable: "Gay-Basher," "neo-numbskull," "hate-mongering," and "bigot."[1] (Complaint ¶ 8.) A copy of Vail's complaint, including the press releases she attached to her complaint, are in the appendix to this brief.

REASONS WHY THIS COURT SHOULD DENY THE PETITION

I. This Court Has No Jurisdiction To Review The Judgment Of The Ohio Supreme Court Because It Rests Upon Ohio Law, Not Federal Law.

A. This Court Will Not Review State Court Judgments Which Rest Upon Independent And Adequate State Law Grounds.

The petitioner bears the burden of establishing the jurisdiction of this Court. *Michigan v. Long*, 463 U.S. 1032, 1042 n.8 (1983).

This Court has no jurisdiction to review judgments of state courts that rest upon adequate and independent state law grounds. *Coleman v. Thompson*, 501 U.S. 722, 729, 740

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[1] She also claimed that Dirck characterized her as a liar, but the column does not contain that characterization.

(1991); *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

This Court can review only issues of federal law. It cannot change a state court's construction of state law. *Coleman*, 501 U.S. at 729; *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974). Thus, state courts are free "to develop state jurisprudence unimpeded by federal interference" and they are "`unfettered . . . in interpreting their state constitutions.'" *Long*, 463 U.S. at 1041 (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)).

Indeed, state courts are free to decide that state constitutions provide more expansive safeguards of individual liberties than those provided by the federal bill of rights. This Court has stated:

> [S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.

Arizona v. Evans, 514 U.S. ___, 131 L.Ed.2d 34, 42 (1995); *accord PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (free speech); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982); *Cooper v. California*, 386 U.S. 58, 62 (1967).

The bar to this Court's review of state court construction of state law arises in part from the separation of sovereign powers between each of the states and the United States. *Long*, 463 U.S. at 1041 *see Coleman*, 501 U.S. at 726.

That bar also arises from the case or controversy limitation of federal jurisdiction in Article III, § 2 of the United States Constitution. If the same judgment would be rendered by a state court construing state law after review by this Court o any perceived federal question, then this Court's ruling would be advisory only. As an advisory opinion, it would violate Article III, § 2. Thus, any resolution by this Court of federal law must control the outcome of the case. *Coleman*, 501 U.S. at 729; *Herb*, 324 U.S. at 125-126; *Muskrat v. United States*, 219 U.S. 346, 359-63 (1911).

B. The *Michigan v. Long* Presumption Of Federal Grounds For Review Of State Court Judgments Applies In Only Limited Circumstances.

In arguing for this Court's jurisdiction, petitioner relies exclusively on *Michigan v. Long*, 463 U.S. 1032. In *Long*, this Court ruled that it will presume federal grounds for review of state court decisions under limited circumstances. The Court stated:

> [W]hen...a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

463 U.S. at 1040-1041.

The *Long* presumption of jurisdiction requires "a clear indication that a state court rested its decision on federal

law." The presumption does not apply where the state court decision "does not fairly appear to rest primarily on federal law" or to be "interwoven" with federal law. *Coleman*, 501 U.S. at 735, 739-740.

Furthermore, the *Long* presumption applies only where state court decisions are at least "ambiguous" because they expressly refer to both state and federal law, making it "unclear from such opinions whether the state law decision is independent of federal law." *Coleman*, 501 U.S. at 732, 733, 734; *see Long*, 463 U.S. at 1038 n.4; *Harris v. Reed*, 489 U.S. 255, 257-258 (1989).

Only where it appears that the state court understood federal law to "compel" the state court's judgment does this Court engage in the presumption of jurisdiction. *Long*, 463 U.S. at 1041, see 1038 n.4, 1042-1043 n.8, 1044.

Whether a state court judgment rests primarily upon federal grounds is determined "from the four corners" or "face" of the state court's opinion. *Long*, 463 U.S. 1040-1041.

C. A State Court Can Avoid A *Michigan v. Long* Presumption By Including In Its Opinion A Plain Statement That Its Judgment Rests On Adequate State Grounds That Are Independent Of Federal Law.

Even where the predicate for the *Long* presumption of federal jurisdiction appears in a state court opinion, a state court defeats the presumption by including a "plain statement" that the judgment "rests upon adequate and independent state

grounds." *Long*, 463 U.S. at 1042, see 1041 & n.7, 1044; *see Coleman*, 501 U.S. at 733.

The "plain statement" does not require a mechanical incantation of specific words. This Court explained:

> We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case....

Coleman, 501 U.S. at 739.

A "plain statement" is sufficient where the state court's opinion indicates that its judgment rests on state law grounds that are in some way independent from the state court's interpretation of federal law, or otherwise indicates that federal law did not "compel" the result. *Long*, 463 U.S. at 1041, 1044; *Arizona*, 514 U.S. at ___, 131 L.Ed.2d at 43; *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989) (state supreme court is free to rest its holding on the state constitution and to divorce the state constitutional issue from questions of federal law).

D. Ohio Law, Not Federal Law, Controlled The Judgment Of The Ohio Supreme Court In *Vail*.

Michigan v. Long does not authorize this Court's review of the Ohio Supreme Court's judgment in *Vail*. The predicate for the *Long* presumption is not present here because the *Vail* decision did not apply federal law and thus does not contain the ambiguity necessary to trigger the presumption. Also, the *Vail* decision contains numerous plain statements that the

Ohio Constitution controlled the court's ruling, and that the scope of the free speech/free press guarantee of the Ohio Constitution does not depend on the scope of the First Amendment as construed by this Court. Indeed, the *Vail* court expressly rejected federal law as controlling its judgment or its interpretation of the Ohio Constitution.

Both the syllabus and majority opinion in *Vail* demonstrate that the decision does not activate the *Long* presumption.

The "controlling point of law" of the *Vail* court's decision is in its syllabus. *Akers v. Serv-A-Portion, Inc.*, 31 Ohio St. 3d 78, 79 n.1, 508 N.E.2d 964, 965 n.1 (1987); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. __, 131 L.Ed.2d 820, 825 (1995). The *Vail* syllabus makes no mention of federal law, but expressly applies "the Ohio Constitution." Six of the seven justices concurred in the syllabus, which states:

> When determining whether speech is protected opinion a court must consider the totality of the circumstances. Specifically, a court should consider: the specific language at issue, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared. (*Scott v. News-Herald* [1986], 25 Ohio St. 3d 243, 496 N.E.2d 699, approved and followed; Section 11, Article I of the Ohio Constitution, applied.)

72 Ohio St. 3d at 279, 649 N.E.2d at 183.

The majority opinion in *Vail*, written by the Chief Justice and in which all but one justice concurred, also does not purport to apply federal law. As in the syllabus, the majority opinion cites the Ohio Constitution and the Ohio Supreme

Court's earlier decision in *Scott v. News-Herald* as the only authorities which the court found to control its judgment. 72 Ohio St. 3d at 280-283, 649 N.E.2d at 184-186.

The *Scott* syllabus did not specify whether state or federal law controlled, and its 4-3 majority opinion cited both the Ohio Constitution and the First Amendment.[2] In *Vail*, however, the Ohio Supreme Court explained that the judgment in *Scott* was not compelled by the First Amendment. The court stated:

> Notwithstanding dicta stating the article was protected opinion under the First Amendment to the United States Constitution, our holding [in *Scott*] was premised on Section 11, Article I of the Ohio Constitution.

72 Ohio St. 3d at 281, 649 N.E.2d at 184.

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[2] The majority opinion stated: "We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution.... The federal Constitution has been construed to protect published opinions...." 25 Ohio St. 3d at 244, 496 N.E.2d at 701.

"These ideals are not only an integral part of First Amendment freedoms under the federal Constitution but are independently reinforced in Section 11, Article I of the Ohio Constitution...." 25 Ohio St. 3d at 245, 496 N.E.2d at 702.

"[I]t is our view that Diadiun's article was constitutionally protected opinion both with respect to the federal Constitution and under our state Constitution." 25 Ohio St. 3d at 254, 496 N.E.2d at 709.

The *Vail* court's firm statement that the First Amendment did not control *Scott* was in response to a query by this Court. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), this Court stated:

> [T]he *Scott* decision...was not clear on its face as to the court's intent to rely on independent state grounds, yet failed to make a "plain statement...that the federal cases...[did] not themselves compel the result that the court...reached."... We note that the Ohio Supreme Court remains free, of course, to address all of the foregoing issues on remand.

497 U.S. at 12 n.5. The *Milkovich* litigation settled before the Ohio Supreme Court could respond to this Court's invitation. The Ohio Supreme Court responded in *Vail*.

Thus, the conditions upon which the *Long* presumption depends are absent in *Vail*. There is no ambiguity about whether federal law compelled the judgment because the Ohio Supreme Court did not cite to federal law. There is no "clear indication" that the Ohio Supreme Court "rested its decision on federal law," nor does the decision "fairly appear to rest primarily on federal law" or to be "interwoven" with federal law. *See Coleman*, 501 U.S. at 735, 739-740.

Moreover, the Ohio Supreme Court's decision is replete with plain statements of the court's reliance on state law.

In addition to plainly stating that *Scott* was based on state law, the *Vail* majority opinion plainly stated that "expressions of opinion are generally protected under Section 11, Article I of the Ohio Constitution" and that "the statements [at issue] are protected under Section 11, Article I of the Ohio

Constitution." 72 Ohio St. 3d at 280, 283, 649 N.E.2d at 184, 186.

The *Vail* syllabus plainly states that the Ohio Supreme Court applied "the Ohio Constitution." 72 Ohio St. 3d at 279, 649 N.E.2d at 183.

Not only did the Ohio Supreme Court state plainly and repeatedly that its judgment rested on the Ohio Constitution, it also emphasized the independence of that adequate state ground. In *Milkovich*, this Court ruled that the First Amendment did not protect the newspaper column that was at issue in *Scott*. Notwithstanding that ruling, the *Vail* court reaffirmed *Scott*. The *Vail* court stated:

> [In *Milkovich*], the United States Supreme Court reached a different conclusion from an application of the First Amendment to the United States Constitution than we had reached in *Scott* applying the Ohio Constitution.
>
> Regardless of the outcome in *Milkovich*, the law in this state is that embodied in *Scott*. The Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press.

72 Ohio St. 3d at 281, 649 N.E.2d at 185.

Further underscoring the independence of Ohio's constitutional protection of opinion, the court stated that the Ohio Constitution "alter[s] the method of analysis" and "shifts" the focus of analysis as compared with First Amendment analysis. 72 Ohio St. 3d at 281-282, 649 N.E.2d at 185.

Justice Wright specially concurred in *Vail* to "stress" the majority opinion's "stated underpinnings--Section 11, Article I of the Ohio Constitution" and that "the protections accorded opinion under the Ohio Constitution are broader than the First Amendment jurisprudence developed by the United States Supreme Court." 72 Ohio St. 3d at 284, 649 N.E.2d at 187.

On its face, the Ohio Supreme Court based its entire decision in *Vail* on adequate state grounds independent of the First Amendment. Indeed, rather than ruling the way it did "because it believed that federal law required it to do so," the *Vail* court made clear that it ruled the way it did despite federal law and rejected *Milkovich* as controlling whether Ohioans enjoy a constitutional privilege to express an opinion. *See Long*, 463 U.S. at 1040-1041. The decision thus renders inapposite the presumption authorized by *Michigan v. Long* and precludes this Court's plenary review.

E. Petitioner's Arguments Fail To Establish This Court's Jurisdiction Under *Michigan v. Long*.

Petitioner's own statements refute her claim of this Court's jurisdiction. She admits that *Vail* made "clear that *Scott* was premised on the Ohio Constitution rather than on the federal Constitution" and that "the essence" of the *Vail* decision is that a privilege to express opinion "is the law in Ohio notwithstanding this Court's decision in *Milkovich*." (Pet. at 21.) Thus, petitioner admits that the judgment at issue rests on state grounds independent of federal law, precluding this Court's review.

Petitioner misportrays *Milkovich* as though this Court ruled irrefutably that the First Amendment controlled the judgment in *Scott*. (Pet. at 24, 28.) This Court actually ruled that *Scott*

was "not clear" on that point. The Court reviewed *Scott* by relying on the Court's *presumption* that federal law controlled, and afforded the Ohio Supreme Court the opportunity on remand to rebut the presumption. The Ohio court has now done so. 497 U.S. at 12 n.5.

Insisting nevertheless that this Court's interpretation of the First Amendment "controls the scope of the Ohio constitutional protections," petitioner asks this Court to read a host of decisions decided by the Ohio Supreme Court before it decided *Vail*. (Pet. 28, 22-24.)

The *Long* presumption, however, is designed to replace this Court's "unsatisfactory" practice of conducting "an independent investigation of state law." *Coleman*, 501 U.S. at 732. To "avoid the costs of excessive inquiry" the *Long* presumption focusses on "the face" and "four corners" of the state court opinion at issue. *Coleman*, 501 U.S. at 737; *Long*, 463 U.S. at 1040-1041, 1043 n.8. Thus, while relying exclusively on *Long*, petitioner asks this Court to engage in the kind of investigation which the Court eschewed in *Long* and which the presumption authorized by *Long* was supposed to replace.

Petitioner relies on selected prior rulings of the Ohio Supreme Court construing the Ohio Constitution, yet petitioner ignores the Ohio Supreme Court's admonitions that *stare decisis* does not impose "'petrifying rigidity'" or a "straitjacket" on the court's interpretation of the law, especially when construing the Ohio Constitution. *City of Rocky River v. State Employment Relations Bd.*, 43 Ohio St. 3d 1, 5-10, 539 N.E.2d 103, 106-111 (1989); *Clark v. Southview Hospital & Family Health Ctr*, 68 Ohio St. 3d 435, 438, 628 N.E.2d 46, 49 (1994); *Bonkowsky v. Bonkowsky*, 69

Ohio St. 2d 152, 154, 431 N.E.2d 998, 999 (1982), *cert. denied*, 457 U.S. 1135 (1982).

Moreover, petitioner mischaracterizes the prior rulings on which she relies. In three of the cases petitioner cites, the court expressly limited its decisions to the facts of those cases and left open the possibility that the Ohio Constitution would provide different protection than that provided by the First Amendment. In a fourth case, the Ohio Supreme Court merely affirmed a lower court's decision without opinion.

In *Eastwood Mall, Inc. v. Slanco*, the Ohio Supreme Court decided that the Ohio Constitution did not require a private owner of a shopping mall to permit picketing and the distribution of handbills on its property. The court was careful to limit its holding to "*the facts of this case.*" 68 Ohio St. 3d 221, 223, 626 N.E.2d 59, 61 (emphasis added), *cert. denied*, 130 L.Ed.2d 288 (1994). One of the justices wrote: "I am heartened by the fact that . . . [the court] has not foreclosed the possibility that Section 11, Article I may afford broader rights under other circumstances." 68 Ohio St. 3d at 228, 626 N.E.2d at 65 (Wright, J., dissenting).

In citing *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals*, petitioner relies exclusively on an "appendix" to the court's decision. The appendix is a court of appeals opinion that was affirmed without opinion by the Ohio Supreme Court. 63 Ohio St. 3d 354, 355, 588 N.E.2d 116, 118 (1992). The litigants in that case did not present the Ohio Supreme Court with authority that free speech protection under the Ohio Constitution is distinct from

protection under the First Amendment.[3] *Eastwood Mall, Inc.*, 68 Ohio St. 3d at 226, 626 N.E.2d at 63 (Wright, J., dissenting).

In *Zacchini v. Scripps-Howard Broadcasting Co.*, the court limited its ruling to "the record before us" and found that record to contain no "compelling" reason to conclude that the effects of the First Amendment were "significantly different" from the effects of the Ohio Constitution. 54 Ohio St. 2d 286, 288, 376 N.E.2d 582, 583 (1978).

Finally, *State v. Kassay*, decided over 60 years ago, opined erroneously that the First Amendment is "not applicable to the states."[4] 126 Ohio St. 177, 187, see 184, 184 N.E. 521, 525, see 524 (1932), *overruled in part on other grounds*, 131 Ohio St. 1, 1 N.E.2d 140 (1936). *Kassay* did not hold that the Ohio Constitution is inextricably linked to the First Amendment. It noted that "the Federal Bill of Rights upon the subject of the freedom of speech and of the press differs from Section 11 of the Ohio Bill of Rights." 126 Ohio St. at 184, 184 N.E. at 524.

In citing earlier Ohio decisions, petitioner omitted several which construed the Ohio Constitution as providing protection

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[3] In contrast, virtually the entire merits brief of the Plain Dealer filed in the Ohio Supreme Court in *Vail* relied upon Ohio's rich heritage of protecting expression of opinion before 1964, when this Court applied the First Amendment to state libel law. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[4] Seven years earlier, this Court stated that the First Amendment applies to the states. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

independent of that provided by the United States Constitution. *Painter v. Graley*, 70 Ohio St. 3d 377, 380, 639 N.E.2d 51, 54 (1994)[5]; *Arnold v. City of Cleveland*, 67 Ohio St. 3d 35, 41-42, 616 N.E.2d 163, 168-169 (1993) and paragraph one of syllabus[6]; *State v. Brown*, 63 Ohio St. 3d 349, 352, 588 N.E.2d 113, 115, *cert. denied*, 121 L.Ed.2d 127 (1992)[7]; *E.W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 125 N.E.2d 896, *dismissed on other grounds*, 164 Ohio St. 261, 130 N.E.2d 701 (1955).[8]

Petitioner also overlooked the many Ohio decisions which protected expression of opinion (especially about political candidates) long before 1964, when this Court first applied the First Amendment to state libel law, and long before 1925,

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[5] (Federal cases construing the First Amendment are "of limited value in our interpretation of the Ohio Constitution, as '[t]he Ohio Constitution is a document of independent force.'")

[6] ("The Ohio Constitution is a document of independent force... As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.")

[7] (An Ohio court is not required to follow this Court's construction of the Fourth Amendment when construing the Ohio Constitution's identical prohibition of unreasonable search and seizure.)

[8] (The Ohio court of appeals recognized a right of the public to attend criminal trials under the Ohio Constitution twenty-five years before this Court recognized a similar constitutional right under the First Amendment in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

when this Court first applied the First Amendment to the states.[9] *E.g.*, *Tappan v. Wilson*, 7 Ohio 190, 192-93 (1835); *Cleveland Leader Printing Co. v. Nethersole*, 84 Ohio St. 118, 133-134, 137-140, 141 (1911); *Shallenberger v. Scripps Publishing Co.*, 20 Ohio Dec. 651 (C.P. Cuyahoga), *aff'd*, 42 Ohio Cir. Dec. 283 (1909), *aff'd*, 85 Ohio St. 492 (1912); *Hogan v. Forest City Publishing Co.*, 18 Ohio L. Abs. 127, 128 (1934); *McCarthy v. Cincinnati Enquirer*, 101 Ohio App. 297, 305-306, 136 N.E.2d 393, 399-340 (1956).

Petitioner also ignored some of the marked differences between the language of Ohio's constitutional free speech and free press guarantees and the language of the First Amendment. Section 11, Article I of the Ohio Constitution provides:

> Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.

Ohio's provision has two distinct clauses. The second clause prohibits governmental suppression of speech. Only that clause -- "no law shall be passed to restrain or abridge the liberty of speech, or of the press" -- corresponds to the First Amendment's language that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The first clause of Ohio's constitutional provision -- "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of

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[9] *New York Times Co.*, 376 U.S. 254 (1964); *Gitlow*, 268 U.S. at 666 (1925).

the right" -- has no counterpart in the text of the First Amendment. It affords an affirmative right of free speech, and even specifies the right to express "sentiments."

Thus, petitioner has failed to demonstrate that the result in *Vail* was compelled by the Ohio Supreme Court's understanding of federal law, or that the Ohio Constitution as construed in *Vail* is controlled by this Court's construction of the First Amendment. Accordingly, petitioner has failed to establish this Court's jurisdiction.

II. This Court May Not Review Petitioner's Purported Federal Claims Because Petitioner Did Not Raise Those Claims In The Ohio Courts, Nor Did The Ohio Courts Otherwise Address Them.

This Court will not review a state court judgment to decide constitutional questions that were not raised while the case was in the state court system, or addressed in the case by the state courts. *E.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Clark v. Jeter*, 486 U.S. 456, 459-460 (1988); *Illinois v. Gates*, 462 U.S. 213, 218-221 (1983).

The bar to review is jurisdictional under 28 U.S.C. § 1257(a), which requires that substantial federal questions be "specially set up or claimed" while the case was in state court. *E.g.*, *Beck v. Washington*, 369 U.S. 541, 553 (1962); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334 (1968) (Harlan, J., dissenting).

In her petition here, petitioner raises for the first time the unprecedented notion that the First Amendment standards expressed in *Milkovich* "should be adopted as part of the constitutional federal common law of libel which no state

court may ignore." (Pet. at 31.) Despite state court litigation that has spanned nearly five years in three levels of the Ohio court system, petitioner has never before made that argument or anything like it. Nor has the notion described by petitioner been addressed independently by any of the Ohio courts below. Accordingly, this Court should not address it either.

Petitioner also argues for the first time that applying Ohio law to dismiss her libel claim abridges her "substantive right to due process under the Fourteenth Amendment." (Pet. 40.) That claim was neither raised by petitioner nor by any Ohio court while this case was in litigation for almost five years. This Court should not address it.

III. Petitioner's Purported Federal Claims Do Not Raise Substantial Federal Questions.

A. Petitioner's Claim That A "Federal Constitutional Common Law Of Libel" Bars State Constitutions From Protecting Speech Does Not Raise A Substantial Federal Question.

This Court should not consider petitioner's purported federal claims for the additional and independent reason that they are insubstantial. This Court will not consider alleged federal issues which already are well-settled or which do not raise weighty matters of federal law that need to be resolved. *See Zucht v. King*, 260 U.S. 174, 176 (1922); *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902).

Petitioner argues for a "federal common law of libel which no state court may ignore," but there is no federal common law of libel. (Pet. at 31.) The Constitution does not empower federal courts "to declare substantive rules of common law

applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The Constitution does not "supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 334 (1986).

Protection of reputation is the domain of the states. Indeed, this Court has invited the states to "define for themselves the appropriate standard of liability" in libel cases. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

This Court has construed the First Amendment to "limit a State's power to award damages in a libel action." *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964). The First Amendment "supersedes the common law's presumptions" that lead to defamation liability and "reshape[s] the common-law landscape" to inhibit or bar liability. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774, 775 (1986).

Petitioner would transform the First Amendment standards limiting liability into standards which require liability. As an unprincipled notion contrary to all First Amendment jurisprudence, petitioner's assertion is not a substantial federal question.

B. Petitioner's Asserted Substantive Due Process Right Does Not Raise A Substantial Federal Question.

This Court has already rejected a substantive due process claim similar to that claimed by petitioner for the first time here. *Paul v. Davis*, 424 U.S. 693 (1976). In *Paul*, the Court decided that the interest in reputation alone does not rise to

the level of "liberty" or "property" under the Due Process clause of the Fourteenth Amendment. 424 U.S. at 701, 712 (1976).

"Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." *Siegert v. Gilley*, 500 U.S. 226, 233, 234 (1991).

In rejecting the notion that defamation coupled with state action amounts to a constitutional deprivation, this Court ruled that the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul*, 424 U.S. at 701.

Here, contrary to petitioner's exaggerated misportrayal of *Vail*, the Ohio Supreme Court did not abolish the tort of defamation. The court merely decided that the Ohio Constitution precludes recovery by petitioner under the circumstances of this case. Petitioner's purported, belated federal claim is insubstantial.

CONCLUSION

For the foregoing reasons, the petitioner has failed to sustain her burden of establishing this Court's jurisdiction to review the final judgment of the Ohio Supreme Court.

Therefore, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LOREN LOVING VAIL Berkshire Road Gates Mills, OH 44040 Plaintiff	:	CASE NO. 199678 JUDGE:
vs.	:	
THE PLAIN DEALER 1801 Superior Avenue Cleveland, OH 44114	:	
and	:	
JOE DIRCK c/o THE PLAIN DEALER 1801 Superior Avenue Cleveland, OH 44114	:	COMPLAINT JURY DEMAND ENDORSED HEREON
and	:	
THOMAS GREER, EDITOR c/o THE PLAIN DEALER 1801 Superior Avenue Cleveland, OH 44114 Defendants	:	

1. That at all time herein mentioned, Plaintiff was and now is, a resident of the City of Gates Mills, County of Cuyahoga, State of Ohio, and the Republican candidate of the Ohio 25th District Senate seat in the November 6, 1990, general elections.

2. That at all times hereinafter mentioned, Defendant THE PLAIN DEALER was, and still is a corporation duly

organized and existing under the laws of the State of Ohio, with its office and principal place of doing business at 1801 Superior Avenue, Cleveland, Ohio 44114, County of Cuyahoga, State of Ohio and was, and now is engaged in the business of printing, publishing and distributing a daily newspaper called THE PLAIN DEALER. This newspaper is circulated throughout Cuyahoga County and adjoining counties and is widely read.

3. That Defendant JOE DIRCK, a columnist for the PLAIN DEALER, conducted activity which gave rise to this claim in the County of Cuyahoga.

4. That Defendant THOMAS GREER, Editor of the PLAIN DEALER, conducted activity which gave rise to this claim in the County of Cuyahoga, and is an employee of Defendant newspaper, THE PLAIN DEALER.

COUNT ONE

5. Plaintiff reavers the allegations contained in Paragraphs 1 through 4 as if fully rewritten herein.

6. On October 19, 1990, Defendant newspaper published an article written by Defendant JOE DIRCK which is attached as Exhibit "A".

7. The article contained false statements and allegations concerning the Plaintiff which reflect upon her honesty and character in a defamatory manner bringing here into ridicule, hatred and contempt.

8. On October 19, 1990, at Page 5B of THE PLAIN DEALER, Defendant, Joe Dirck made statements and allegations concerning the Plaintiff. (See Exhibit "A"). Defendant Dirck called and accused the Plaintiff of being a "Gay-Basher", "neo-numbskull", "hate-mongering", a liar, and a bigot in response

to Plaintiff's press release which was never published. (See Exhibit "B"). Only selected portions of the release were pulled and used out of context to libel the Plaintiff. The Plaintiff's news release had never been published by the Defendant newspaper, nor anywhere else prior to Defendant Dirck's libelous allegations.

9. Said article was published with malice and reckless disregard for the truth with the intent to injure Plaintiff's reputation and campaign.

10. As a result Plaintiff has suffered mental anguish, ridicule, humiliation and great loss of reputation..

COUNT TWO

11. Plaintiff reavers the allegations contained in Paragraphs 1 through 10 as if fully rewritten herein.

12. That at all times relevant the Defendant THE PLAIN DEALER, was a "newspaper" within the meaning of O.R.C. Section 2739.11.

13. Defendant THE PLAIN DEALER, refused to print, publish and circulate a press release presented by Plaintiff setting forth in proper language the truth pertaining to the libelous statements of JOE DIRCK and THE PLAIN DEALER. (See Exhibit "B").

14. In an attempt to seek immediate redress, Plaintiff offered to purchase space in the Defendant's newspaper through its Advertising Director for the purpose of having the release published. This offer was denied. The reason given was that no explanatory letter (See Exhibit "C") would be permitted to accompany the release. This effectively denied the redress sought by the Plaintiff. (See Affidavit attached)

15. The refusal was in violation of O.R.C. Section 2739.11. Applicable by Section 2739.11.

COUNT THREE

16. Plaintiff reavers the allegations contained in Paragraphs 1 through 15 as if fully rewritten herein.

17. Defendants' wrote and published the defamatory statements with the intent to cause Plaintiff sever emotional distress, or with recklessness as to the effect of their conduct.

18. The acts of the Defendants amounted to extreme and outrageous conduct, beyond any First Amendment protection.

19. the conduct of the Defendants caused damage and injury to the Plaintiff, and her reputation, and she has suffered severe emotional distress.

COUNT FOUR

20. Plaintiff reavers the allegations contained in Paragraphs 1 through 18 as if fully rewritten herein.

21. Defendants' THE PLAIN DEALER and its employee THOMAS GREER and Defendant JOE DIRCK owed a duty of care to act reasonably toward the Plaintiff.

22. Defendants breached that duty of care by writing, publishing and circulating the defamatory statements of October 19, 1990. (See Exhibit "A" attached)

23. The Plaintiff has suffered injury to herself, and her reputation as a direct and proximate result of the conduct of the Defendants.

WHEREFORE. Plaintiff prays for the judgment against the Defendants jointly and severally in a sum of money damages that will fully and fairly compensate her as a result of the

publication of the libelous statements by the Defendants, the costs of this action, punitive damages and reasonable attorneys' fees.

LOREN LOVING VAIL, ESQ.
PHILLIP A. LAWRENCE, ESQ.
26 South Franklin St.,
P.O. Box 226
Chagrin Falls, OH 44022
(216) 247-8933

JURY DEMAND

A trial by Jury is requested hereon.

LOREN LOVING VAIL, ESQ.
PHILLIP A. LAWRENCE, ESQ.

EXHIBIT A

[The Plain Dealer; October 19, 1990]

JOE DIRCK, COMMENTARY

Gay-basher takes refuge in the closet

As this appears to be a cornerstone of her campaign, we'll put it real high so nobody misses it: Loren Loving Vail doesn't like gay people. Everybody got that? Good.

Despite earlier disavowals that she would do so, Vail, a Republican running for the 25th District seat in the Ohio Senate, has added gay-bashing to the repertoire of right-wing, neo-numbskull tactics she is employing in her increasingly distasteful campaign against Democrat Eric Fingerhut.

Her latest eruption came this week, when she got on her high horse about Lorain Catholic High School adding the words "born and unborn" to the end of the Pledge of Allegiance. Although Lorain is a long way form the East Side 25th District, Vail issued a news release defending the school's First Amendment rights and blasting "the minority far left individuals who attack those who want to return value consciousness and stability to their society."

Now, I'm all for the First Amendment, but I think Vail is a little confused. No one on the left, to my knowledge, was challenging the school's right to free speech. Representatives of both the American Civil Liberties Union and the National Organization for Women, in fact, defended that very right. Those who would outlaw the things with which they disagree more often that not come from Vail's end of the political spectrum.

This might have been just another example of an opportunistic candidate trying to get a little mileage out of a momentarily hot issue, but Vail also took the occasion to make another pitch for the homophobic vote, attacking the Gay People's Chronicle for a recent editorial criticizing Lorain Catholic and for a cartoon poking fun at Vail's "pro-values" campaign.

Calling the cartoon "obscene" (the neo-numbskulls toss that word around a lot, but this particular cartoon doesn't even come close), Vail couldn't resist noting in closing that her opponent "Mr. Fingerhut, and his far left agenda, is supported by (the Chronicles)."

Deja vu. Last June, Vail similarly interjected herself into the controversy over the speech governor's wife Dagmar Celeste gave to a gay group in Cincinnati. Although many, including myself, questioned the propriety of the language Celeste used in a public setting, Vail escalated it into an anti-homosexual diatribe, and again tried to nail Fingerhut on a guilt-by-association rap.

"Dear Media," she coyly added to the end of her June news release, "I have only heard, not read, that my opponent, Mr. Fingerhut, has been endorsed by the Gay People's Chronicle. Could you please check this out for Me? Thank you."

Well, maybe her strategy will work. Vail wouldn't be the first candidate to latch onto homophobia as a ticket to Columbus. She need look no farther than Parma, where Sen. Gary Suhadolnik has developed it into an art form. He's such an outspoken and vitriolic gay-hater you wonder what a psychiatrist would have to say about it.

The only thing I don't understand is why, when she was asked about the Dagmar incident during an interview at The Plain Dealer, Vail went to such lengths to deny any intention to use gay-bashing as a campaign tactic. Why, goodness no, she insisted, that was the farthest thing from her mind.

Of course, she could understand how someone reading her comments might have gotten that impression, but she's not the sort of person to take political advantage of prejudice and mindless hatred directed at a particular group of people. She certainly would be more careful in the future, she promised the folks here.

So much for promises. Having learned long ago never to underestimate the neo-numbskull vote, I won't hazard a guess on whether her hat-mongering will work.

But although I personally don't have much use for bigots of any sort, I have a particular problem with those who can't even be up front about it.

Honesty, it would appear, is one value on which Vail is not so "pro."

EXHIBIT B

[photograph] LOREN L♥VING VAIL
FOR OHIO SENATE 25TH DISTRICT

10-13-90
FOR IMMEDIATE RELEASE

"VAIL DEFENDS LORAIN CATHOLIC"

Loren Loving Vail, candidate for Ohio Senate 25th District, today defended Lorain Catholic High School's addition of the words "born and unborn" to the Pledge of Allegiance. Ms. Martha Pontoni, the head of NARAL in Cleveland, and editor of Gay People's Chronicle had attacked the school for "teaching young children that they do not have the right to decide over their own bodies."

Mrs. Vail said she too had recently been bashed by Ms. Pontoni for taking a pro-values stand in her campaign. Mrs. Vail had previously objected to the use of obscene speech in public by the Governor's wife. Then Ms. Pontoni's editorial page in The Gay Chronicle attacked Mrs. Vail with obscene speech in a political cartoon with the phrase, "Get a 'heart' on 4 Loving Vail." October, 1990 Vol. 6 Issue 4 Page 2.

It is time that citizens for decency and values stand up to the minority far left individuals who attack those who want to return value consciousness and stability to their society. Lorain Catholic's administration and students had an absolute constitutional right to add their human rights stand to the Pledge of Allegiance., said Mrs. Vail a civil rights lawyer. Contrary to Ms. Pontoni's remarks, the school was legally correct to teach their children that liberties and rights attach to human life in our society.

We live in a contradictory society that attacks the decent, value conscious speech we would want our children to learn. Instead it allows freedom of expression to obscene, pornographic "art" for our children to visualize. Where are the leaders of this land who have the strength of character and courage of convictions to say that Pontoni's actions are wrong? Mrs. Vail said she will always demand ethical accountability from government when she is elected Senator from the 25th District.

Mrs. Vail encouraged all Catholic parents to unite and stand strong against this attack on their children's constitutional right to freedom of speech. Our parochial schools are certainly a bastion of values education in our society, and must be protected and encouraged.

Finally, Mrs. Vail noted that her opponent Mr. Fingerhut, and his far left agenda, is supported by Ms. Pontoni.

Paid For By Vail For Senate Committee,
M. Trentanelli, Secretary, (216) 432-1132,
139 Chatham Way, Mayfield Hts. Ohio 44124

EXHIBIT C

{Letterhead omitted in printing}

October 22, 1990

AN OPEN LETTER TO PLAIN DEALER READERS

On October 19, 1990, front page of Metro, Joe Dirck* called me a "bigot, a neo-numbskull, and a gay-basher and a hate-monger" because of the following release I had written in defense of Lorain Catholic. Please note that my release had never been published by The Plain Dealer before he wrote his column.

Joe Dirck wrongfully twisted and perverted the truth and the intent of my press release. His type of "journalism" is irresponsible and inexcusable. You the reader should have had the opportunity to read the release and formulate your own intelligent opinions. Because of Dirck's malicious attack, I requested that The Plain Dealer provide "equal time and fairness" and print my release but they refused. Hence my campaign has had to pay for its publication so that you readers will be able to read "the other side" of the story.

I urge you readers to demand honesty, fairness, and truthfulness from "values-bashers" such as Dirck.

*Dirck is married to Mary Anne Sharkey, Director of the Plain Dealer Editorial Page. Last June it was Ms. Sharkey's column that had attacked me for opposing Dagamar Celeste's obscene speech.